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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1267

BAYSIDE ENTERPRISES, INC.,
PENOBSCOT POULTRY COMPANY,
AND POULTRY PROCESSING, INC.,
PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners, Bayside Enterprises, Inc., Penobscot Poultry Company and Poultry Processing, Inc., pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the First Circuit entered in this case on December 10, 1975.

Opinions Below

The opinion of the Court of Appeals is reprinted as Appendix A of this petition. The findings of fact, concusions of law, and order of the National Labor Relations Board are reprinted as Appendix B of this petition and reported at 216 N.L.R.B. No. 92 (1975).

Jurisdiction

The decree of the Court of Appeals was entered on December 10, 1975 (Appendix A, p. A-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and pursuant to Rule 19-1.(b) of the Rules of this Court.

Question Presented

Whether a poultry organization vertically integrated from hatcheries to processing plant is a "farmer" qualifying its employees who drive feed trucks to its contract farms as exempt "agricultural laborers" within the agricultural exemption of the National Labor Relations Act (29 U.S.C. § 152(3)) as defined in the Fair Labor Standards Act (29 U.S.C. § 203(f)).

Statutes Involved

1. The National Labor Relations Act, 29 U.S.C. § 152(3) "The term 'employee' . . . shall not include any individual employed as an agricultural laborer . . ."

2. Since 1946, the appropriation acts for the National Labor Relations Board have regularly carried a rider which provides that the term "agricultural laborer" shall be defined in accordance with Section 203(f) of the F.L.S.A.

3. The Fair Labor Standards Act, 29 U.S.C. § 203(f) provides "agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . the raising of livestock, bees, furbearing animals, or poultry, and any practices . . . performed by a farmer or on a farm as an incident to, or in conjunction with, such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

Statement of the Case

Petitioners, Bayside Enterprises, Inc. and Poultry Processing, Inc., parent and subsidiary, are an integrated poultry organization located in four separate towns in central coastal Maine. The operation is organized functionally. Bayside carries out the poultry hatching and growing and Poultry Processing is responsible for the milling, processing and marketing. Specifically Bayside has a pedigree hatchery for breeding at Waldo, Maine and a commercial hatchery at Unity, Maine to supply chicks to its farms.

In addition to Bayside's own six farms that produce hatching eggs, there are 119 independent farmers that are under contract with Bayside to raise poultry. The essence of the contract is that Bayside provides each farmer with chicks, feed, medicine, fuel, litter and vaccines, and makes all management and marketing decisions. The farmer is required to furnish the housing utilities and feed, and look after the birds. For this service he is paid on the basis of a guarantee for poultry house square footage plus a bonus based on pounds of poultry he produces. The title to the birds at all times remains in Bayside.

Besides the hundreds of thousands of broilers, roasters and capons located on the contract farms and the chicks and eggs in the hatcheries, Bayside owns the grain, the medicines and other feed ingredients which are milled together at a mill in Thorndike, Maine. This mill is owned and operated by Poultry Processing which mixes the feed to the specifications of the Bayside broiler department manager based on the weather and the age or health of a particular flock.

Bayside employs a farm crew whose duties include going from farm to farm vaccinating, blood testing and cleaning the chicken houses after the flock has been taken out. In all there are some 80 employees who work for Bayside

including a geneticist, four poultry servicemen (who maintain standards of animal husbandry and are constantly checking for disease) and the six feed drivers that are the subject of this case.

Bayside owns four specially constructed feed trucks, three of which are used daily on two shifts by the six feed drivers. Their job is to shuttle back and forth between the feed mill and the 119 contract farms bringing feed and medicine in accordance with the schedule made up by the Bayside dispatcher.

Poultry Processing has about 400 employees divided roughly into 20 in its feed mill and 380 in its Belfast, Maine processing plant. The general offices of the two corporations are at a separate Belfast location. Operating out of the processing plant with separate supervision is a group of drivers whose job is to drive flatbed trailers with coops onto the farms, catch the birds and transport them back to the processing plant. After processing a separate group of drivers at the processing plant with I.C.C. permits, take the birds to market. The processing plant only processes the Bayside birds. However, at the time of this hearing one-third of the production of the feed mill was sold to another unaffiliated farm organization for its own contract farm requirements. It, however, employed an independent feed transportation company to pick up at the feed mill and deliver to its growers. Bayside's feed drivers bring feed to only Bayside's farms.

The Board's Decision and Order

The administrative law judge affirmed by the Board held that the Bayside-Poultry Processing operation constituted "a multifaceted organization whose enterprises and purposes go far beyond traditional farming" and that "while Bayside's own farms and hatcheries may constitute branches of farming, the overall operations of Bayside and Poultry Processing, and more specifically the feed

mill and feed delivery operations, may not be removed from coverage by the Act by utilizing these aspects of Bayside's operations which are traditional branches of farming to characterize Bayside's entire operation as farming".

The decision then stated that the case was indistinguishable from *Samuel Gass, et al.,* 154 N.L.R.B. 728 *enf'd* 377 F.2d 438 (1st Cir. 1967) and *McElrath Poultry Co., Inc.,* 206 N.L.R.B. No. 94 *enf. denied* 494 F.2d 518 (5th Cir. 1974).

The Decision of the Court of Appeals

On the Board's petition for enforcement the First Circuit Court of Appeals was faced with a split of authority with regard to the applicability of the farm exemption as it applies to employees of poultry organizations. On the one side was the Board majority and its own *N.L.R.B.* v. *Gass,* 377 F.2d 438, 444 (1st Cir. 1967) decision holding feed drivers not exempt. On the other side were decisions of the Fifth, Eighth, and Ninth Circuit Courts of Appeals [1] and the minority of the Board chastizing the majority for being unwilling to file a petition for certiorari, notwithstanding five years of adverse decisions. The minority argued it was now time to acquiesce and declare these employees exempt.[2]

Counsel for the corporations sought to have this Court of Appeals confine its *Gass, supra* to the facts of that case; namely, that the employing entity was a trucking company and therefore a separately organized business

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[1] *McElrath Poultry Co., Inc.* v. *N.L.R.B.,* 494 F.2d 519 (5th Cir. 1974); *Abbott Farms, Inc.* v. *N.L.R.B,* 487 F.2d 904 (5th Cir. 1973); *Wirtz* v. *Tyson's Poultry, Inc.,* 355 F.2d 255 (8th Cir. 1966); *N.L.R.B.* v. *Victor Ryckebosch, Inc.,* 471 F.2d 20 (9th Cir. 1972); and *N.L.R.B.* v. *Strain Poultry Farms, Inc.,* 405 F.2d 1025 (5th Cir. 1969).

[2] *Colchester Egg Farms,* 214 N.L.R.B. No. 64 (1974). See the *40th Annual Report of the National Labor Relations Board* (1975), pp. 67-68.

not entitled to the farm exemption. See, e.g., *N.L.R.B.* v. *Kent Bros. Transportation Co.*, 485 F.2d 480 (9th Cir. 1972).

However, the First Circuit Court of Appeals chose not to accept this attempt to reconcile its holding in *Gass, supra* with the decisions in the other circuits saying it found the other cases "both distinguishable and unpersuasive". The court's approach was to break down petitioners' organization into its component parts — feed mill, processing plant, chick hatcheries, breeding farms and contract farms and then make the judgment that it was a commercial rather than agricultural venture since the bulk of its capital and personnel were devoted to nonfarming operations. It bolstered its argument with a Department of Labor interpretation at 29 C.F.R. 780.126 (1972) having to do with feed dealers and processors. As for the feed drivers, it declared them part of a separate organization "supportive of agricultural activity, but not directly engaged in farming". *N.L.R.B.* v. *Bayside Enterprises, Inc.*, — F.2d — (1st Cir. 1975).

The object of this petition is to put into issue under the agricultural exemption of the N.L.R.B. the status of the vertically integrated poultry organization as an employing entity, to wit, is it a farmer under the secondary definition of farming in *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 762-63 (1949), and the status of its feed drivers as being incidental to that farming.

Reasons for Granting the Writ

This case emerges out of one of the most dynamic industries in American agriculture. In the 1920's most poultry was produced in small scale farm enterprises, almost completely integrated. Poultry producers commonly hatched eggs on the farm, used home grown feeds, slaughtered and processed poultry. Some even hauled the birds to market. A few retailed them.

Beginning in the 1930's, various phases of poultry production became separate entities and profit centers. Specialized firms began to emerge in primary breeding, hatching, feed milling, processing and marketing. Most prominent were the independent feed dealer and poultry hauler who had various types of supply contracts with processors.

As the scale of specialized firms increased and the industry began to expand rapidly during World War II, problems developed in coordination of firms in various vertical stages. Vertical integration emerged as a means of minimizing or sharing risks with price and production variabilities.

Currently, more than 95 percent of the broilers produced in the United States are grown under contract in integrator-owned or integrator-leased facilities.

A very limited market exists for live broilers produced by independent growers. Most live broiler trading is between integrated firms or processors.

The emerging integrated structure of the broiler industry brought with it the demise of small independent farms. Narrowing profit margins first put specialized hatcheries at a disadvantage. Independent feed dealers and local feed mill next faced the price-costs squeeze. Finally, in the last few years, specialized independent processors faced the same problems.

Today the typical firm in the broiler industry is a large vertically integrated broiler organization.[3]

This development has taken place against the general background of all agriculture in which mechanization, new production technology and sophisticated management systems have proliferated — all designed to achieve greater cost efficiency. In addition, agriculture has begun an ir-

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[3] The Broiler Industry: An Economic Study of Structure, Practices and Problems, U.S. Department of Agriculture (1971).

reversible course of consolidation accompanied by an increase in size of the average farm.

In the broiler industry this development has seen, in the last 20 years, production of broilers go from 1/3 billion to more than 2½ billion along with a price decline and a quality improvement. Per capita consumption of broiler meat has increased from 0.5 pound in 1934 to an estimated 32 pounds in 1966.

The broiler industry is centered in four general areas of the United States; the South, Delaware, New England and the Far West. Of these, the South is the most important, producing over two-fifths of the output of the industry.[4] Nearly all broilers today are produced by contract growers of integrated broiler firms. Production per farm averages more than 50,000 birds per year.[4A]

A typical integrated broiler producing and marketing firm has its own hatchery, feed mill and processing plant.[5]

The petitioners contend that their feed drivers are entitled to the agricultural exemption under the secondary definition as laid down in *Farmers Reservoir & Irrigation Co.* v. *McComb,* 337 U.S. 755, 762-63 (1949); namely, "any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm incident to or in conjunction with 'such' farming operations".

Both the National Labor Relations Board and the First Circuit Court of Appeals have denied this position maintaining essentially that Bayside is: 1) not a single farmer because of many contract growers; and 2) is not a farmer at all or at least not predominantly a farmer because its processing plant gives it a commercial coloration.

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[4] The Broiler Industry, *supra,* p. 5.

[4A] Contract growing has been accompanied by a 900 percent increase in output since 1948. "Trust Busting Down on the Farm; Narrowing the Scope of Antitrust Exemptions for Agricultural Cooperatives", 61 Virginia Law Review 341, 362 (1975).

[5] *Ibid,* p. 22.

The issue of essential importance in this case is what are vertically integrated poultry organizations in contemplation of the law. Since the agricultural exemption of the National Labor Relations Act depends on the Fair Labor Standards Act for its definition, two important labor statutes are involved in this decision. Although the Fair Labor Standards Act says explicitly that the raising of poultry is an exempt agricultural activity, has the vertically integrated poultry operation somehow annihilated itself as an agricultural entity either by having contract farms or by establishing its own processing plant?

This decision by the First Circuit places the issue squarely in conflict. In New England henceforth, the chief enforcement officers of both the National Labor Relations Board and the Wage and Hour Division must rule that a vertically integrated poultry operation is not a farmer and that therefore, its employees are not eligible for the farm exemption. Meanwhile in at least two of the other three producing areas (the Far West, 9th Circuit and the South, Fifth Circuit), the holding is that a vertically integrated organization is a farmer. In a competitive, price conscious industry such as this where pennies make the difference between success and failure and poultry can be frozen and transported across the country in a day as well as to foreign countries, any unequal treatment can be ruinous.

It obviously cannot be explained to the layman as to why the driver of a feed truck for an integrated poultry organization in Georgia is exempt[6] and the same man working for a similar organization in Maine is not. It is little consolation to the corporation that the First Circuit finds decisions of other circuits "unpersuasive"[7] or that it "declines to follow" them.[8]

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[6] *McElrath Poultry Company, Inc.* v. *N.L.R.B.,* 494 F.2d 518, *per curiam* opinion (5th Cir. 1974).

[7] *N.L.R.B.* v. *Bayside Enterprises, Inc.,* ___ F.2d ___ (1st Cir. 1975).

[8] *N.L.R.B.* v. *Samuel B. Gass,* 377 F.2d 438, 444 n. 12 (1st Cir. 1967).

This issue of contract farming and the relationship of the farmer to the integrator does not confine itself to the poultry industry. The egg industry, although not making use of contract farming to the extent of the poultry industry, is very heavily concerned with the answer to the question as to whether the farmers' contracts amount to a total integration of the farmers into the contractor's business or still allow him to be considered independent.[9]

Within the poultry industry itself there are other, different occupations affected by whether their employer is a farmer or a commercial enterprise — the farm servicemen and the pickup crews, for example.[10]

In addition, a great many other farm commodities are the object of contract farming and have seen a substantial proportion of the entrepreneurship function transferred from the farmer to the contractor. For example, there are tomatoes, green and wax beans, peas, sweet corn and various fruits.

Although not controlled by Section 3(f) of the Fair Labor Standards Act, there are many other statutes that exempt "agricultural labor" from their provisions. The Maine Unemployment Statute is one.[11] In speaking on this same issue concerning the poultry industry, the highest Maine court said "We are not aware of any decision which labels the business of raising poultry as a business

[9] *Colchester Egg Farms*, 214 N.L.R.B., No. 64 (1974).

[10] *Maplewood Poultry Company* v. *Maine Employment Security Commission*, 151 Me. 467, 468, 121 A.2d 360 (1956); See also *Drummons Poultry Transportation Service* v. *Wheeler*, 178 F. Supp. 12 (D. Me. 1959) and *Drummond* v. *Maine Employment Security Commission*, 157 Me. 404, 173 A.2d 353 (1961).

[11] Title 26 M.R.S.A. 1043-1.A (1959) defined argicultural labor substantially like Section 3(f) of F.L.S.A. In 1973, the definition was changed twice, excluding the agricultural labor exemption, unless more than one-half of the product was produced by the operator for which the services were performed. The additional changes excluded the definition entirely for "commercial" hatchery processing and transportation of poultry, but specifically included services performed on a "family-type farm" with not over 100,000 laying birds.

enterprise."[12] *Maplewood Poultry Company* v. *Maine Employment Security Commission*, 151 Me. 467, 472 (1956). The present decision by the First Circuit Court of Appeals changes that. There are other acts as well, concerned with defining agricultural labor.[13]

The Employing Entity — Single or Multiple

Although the emphasis in the First Circuit Court of Appeals' opinion denying the agricultural exemption to Bayside is on the predominance of the commercial components of the business, the decision makes it very clear that even if the corporations were not integrated to the processing plant level that they would not even then be regarded as a farmer. The Court says it is not persuaded by the rationale of the decisions in the other circuits.

It thus firmly takes a position with the majority of the National Labor Relations Board that the raising of the poultry is not being done by the integrator, but by its contract farms. The Court of Appeals in *N.L.R.B.* v. *Strain Poultry Farms, Inc.*, 405 F.2d 1025, 1033 (5th Cir. 1969), says ". . . the Board's finding that the employees were not agricultural employees can only be sustained if respondent's arrangement with the independent growers is viewed as removing it from the primary definition of agriculture pertinent here 'the raising of poultry' ". The dissenters in *Colchester Egg Farms, Inc.*, 214 N.L.R.B. No. 64 (1974), say that the courts have repeatedly rejected the Board's attempt to compartmentalize what is essentially a total "farming" activity.

[12] Vertical Coordination via Contract Farming, Economic Research Service, U.S. Department of Agriculture, Miscellaneous Publication No. 1073, p. 91 (1968).

[13] Federal Unemployment Tax Act, 26 U.S.C. 3306(c)(1), (k) (1954); the Social Security Act 42 U.S.C. 409(h)(2) (1935). In addition the Clayton Act, 15 U.S.C. § 17 (1970) and the Capper-Volstead Act, 7 U.S.C. 291-92 (1970) allow Bayside to join a farm cooperative and Section 61-4 of the Internal Revenue Regulations allow it to file on a cash basis as a farmer

The Growout Contract

As previously mentioned, the poultry industry is now almost entirely operating *under a system of contract* farmers. Considerations of efficiency in feed delivery and other service activity plus assembly of the final product give certain advantages to compact growout territories. The result is local monopolies in the market for contracts.

One study published by the Department of Agriculture seeks to set up a classification system for these farmer-contractor contracts.[14] The system is designed to classify contracts according to the degree to which various elements of entrepreneurship are shifted by contractual agreement from the farmer to the contractor. One view of integration holds that integration increases as elements of entrepreneurship are shifted from the farmer to the contractor, chiefly through assumption of management control and decision-making. Implicit in this view is a corollary assumption that increased integration results in increased assumption of risk and uncertainty by the contractor and increased certainty of price and market for the farmer.

Judged by these standards the poultry industry, in general, and Bayside, in particular, are the most highly integrated of industries and companies. Dividing decision-making into input decisions (acquiring the animals), production decisions and marketing decisions, in all categories, Bayside's control is almost total. (See Appendix C.)

The Bayside-Poultry Processing Management decides what type of poultry to grow and when and where to grow it. It owns the flocks and bears the risk of loss at all phases. It sets production standards, makes the sole decisions as to animal husbandry, including medical care of the poultry. It restricts the farmer from handling any other poultry. It makes all marketing and pricing

[14] Vertical Coordination in Contract Farming, *infra*, p. 74.

decisions, including the timing of the processing of each flock.[15] The feed drivers are controlled by the age and health of each particular flock along with the weather that affects their eating habits.

The First Circuit Court of Appeals uses its own decision in *Bowie* v. *Gonzalez,* 117 F.2d 11, 18 (1st Cir. 1941), for the proposition that the contract farms on which the poultry are grown are each separate independent operations and that they are the farmers and not the contractor or integrator. Although the approach is like other past Board[16] and Court[17] decisions, the application to the

[15] The contract farmers complain that their situation is created in part because economy demands high density growout areas, not allowing any alternative contractor to bid for growers, except in fringe areas. There is also lack of information about comparable contracts allowing market forces to operate in optimum fashion. They also say that even an independent farmer with the capital is forced into a contractual arrangement because of the impossibility of getting chicks and because the system doesn't allow for a live market for independent production. The State of Maine has attempted to help these farmers by passing the *Maine Agricultural Marketing and Bargaining Act of 1973*, 13 M.R.S. 1953, to help "the bargaining position of individual farmers".

[16] *George I. Petit, Inc.*, (1950) 89 N.L.R.B. 710, 711, n. 4. (poultry processing employees whose employer purchased all poultry and eggs are not exempt); *Stockbridge Vegetable Producers, Inc.*, (1961), 121 N.L.R.B. 1395 (truckdrivers and box stitchers of a grower shipper who packs crops grown by another held not exempt); *Norton & McElroy Produce, Inc.*, (1961), 133 N.L.R.B. 104 (truckdrivers and stitchers in the fields are not agricultural laborers if employed by a firm shipping and marketing produce bought from farmers).

[17] *N.L.R.B.* v. *Tepper*, 297 F.2d 280 (10th Cir. 1961) (a dairy employee who worked processing milk products, some of which came from other farms not exempt); *Mitchell* v. *Hunt*, 263 F.2d 913 (5th Cir. 1959) (employees of auction barn selling livestock belonging to other farmers than the farmer operator not exempt). *Mitchell* v. *Huntsville Wholesale Nurseries, Inc.*, 267 F.2d 286 (5th Cir. 1969) (warehouse owners who make advances to growers against marketable plants produced for it was not exempt as Huntsville did not grow the nursery stock. It bought it from independent growers.)

vertically integrated poultry operation is misconceived.

The important factor in determining whether or not the farmer has been truly and totally integrated into the contractor's business is the substance of their relationship.

The Fifth Circuit in the fact of its own decision in *Mitchell* v. *Huntsville Wholesale Nurseries, Inc.*, 267 F.2d 286 (5th Cir. 1959), to bolster the denial of the exemption looked at poultry industry contract farming, and said:

> "The fact that Strain hired the independent growers to raise its birds and contract loaders to catch the birds for loading onto its trucks, would not seem to destroy its claim to having raised the poultry. . . . The trucking operation was a part of an integrated poultry raising operation and although unlike poultry farms of the past, it is today a typical broiler raising operation . . . .
>
> As in all the other cases cited by the Board on this point, the distinction between those situations and the present one is that these birds belonged to the respondent and although the raising of them was shared with independent growers, Strain's activities were more nearly that of one engaged in the 'raising of . . . poultry' than that of a purchaser jobber; Huntsville clearly did not grow the nursery stock in question; it bought it from independent growers."
>
> *N.L.R.B.* v. *Strain Poultry Farms, Inc.*, 405 F.2d 1025, 1032-33 (5th Cir. 1969)[18]

[18] Since *Strain* was decided after *N.L.R.B.* v. *Gass*, 377 F.2d 438 (1st Cir. 1967), the Fifth Circuit considered it and found it to be distinguishable because there the drivers were not employed by the farmers nor were they under their control. Of course Bayside does employ and control the driver; however, the First Circuit chose not to accept the Fifth Circuit's distinction.

Agricultural or Commercial

With this case the Board established and the First Circuit Court of Appeals sustained what was essentially a new rationale to achieve the same result—the denial of the agricultural exemption to an integrated poultry firm. The court decision recast its *Gass* rationale[19] *post hoc* so that the feed drivers were employed by an integrated poultry *processing* company. The interpretative bulletin 29 C.F.R. 780, 126 (1972)[20] having to do with feed dealers and processors was used to bolster the argument. And finally the poultry firm was dismembered into its component parts and pronounced "not predominantly agriculture".

The answer to all of this is obvious. *Gass* was an independent trucking company and never entitled to the farm exemption under the F.L.S.A. Bayside is neither a feed dealer nor a processor, so that the interpretative bulletin does not apply. It, along with its subsidiary, Poultry Processing, Inc., make up a vertically integrated poultry organization whose aim is to prosper raising and selling poultry. As such if it—a typical broiler operation of today—is not considered a poultry raiser, then there aren't any. Bayside-Poultry Processing is not a mercantile enterprise. Common sense tells us it is a farming operation; however, rather than being farmer-based, the modern integrated farm corporation is management based. It has arisen for many reasons, one of the important ones being because of the necessity for closer coordination between the production and marketing phase than price could supply.[21]

[19] 377 F.2d 438, 444.

[20] The decision states this was promulgated in 1974. Actually the date was June 17, 1972, before *McElrath*, *Abbott Farms*, and *Victor Ryckebosch* ignored it.

[21] In addition, individuals are incorporating their operations to take advantage of the tax laws, increased bargaining power, insulation from risk and continuity of management.

However, the primary purpose of the petitioners' poultry business is to produce, hatch, raise and sell poultry. The various components of the corporation constitute a single integrated farming venture producing and processing its own poultry. *Etchechoury* v. *Avi-Simplot, Inc.*, 43 Idaho 438, 462 P.2d 737, 741.

It is important to understand that the real significance of this case and the reason it must be overruled is because drawn to its logical conclusion, it disqualifies every off-farm employee working for a vertically integrated operation from qualifying under the secondary definition of agriculture. This is because the first requisite is that the employee works for a farmer, and if the integrator is not regarded as such, you do not get to the next question as to whether or not his job is incidental to or in conjunction with farming. Just as petitioners do not claim all of its employees automatically exempt, so too the First Circuit Court of Appeals should not allow them to be regarded as automatically covered.

The six feed drivers involved here are controlled by the broiler department dispatcher. They are separate from the processing plant operation. Their job is completely involved in maintaining the growth cycle and health of the birds on each individual farm. They along with the farm servicemen and the pick-up crews are necessary and essential for the raising, feeding, caring for, and management of the poultry growing operation.[22]

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[22] *Maneja* v. *Waialua* (1961) 349 U.S. 254 (railroad employees); *McElrath Poultry Co.* v. *N.L.R.B.*, 494 F.2d 418 (5th Cir. 1974); *Vives* v. *Serralles*, 145 F.2d 552 (1st Cir. 1944); *Witrz* v. *Osceola Farms Company*, 372 F.2d 584 (5th Cir. 1967); *Eastern Sugar Associates* (1952) 99 N.L.R.B. 809.

Judicial or Legislative

This Court in *Farmers Reservoir and Irrigation Co.* v. *McComb*, 337 U.S. 755, 760 (1949), spoke in general terms about the definition of agriculture:

> "Whether a particular type of activity is agricultural depends, in large measure, upon the way in which that activity is organized in a particular society. The determination cannot be made in the abstract. In less advanced societies the agricultural function included many types of activity which, in others, are not agricultural. The fashioning of tools, the provision of fertilizer, the processing of the product, to mention only a few examples, are functions which, in some societies, are performed on the farm by farmers as part of their normal agricultrural routine. *Economic progress, however, is characterized by a progressive division of labor and separation of function.* (emphasis supplied)

What has happened in the poultry industry is that it has come full circle since the 1920's from the *single farmer performing all functions to the corporate organization performing all functions.* In this case economic progress has resulted in a combination rather than a division in the form of the vertically integrated farm organization.

The question has arisen of how to treat these organizations in contemplation of the law because certainly they have many of the characteristics of a commercial enterprise rather than an agricultural one.[23]

Petitioners contend that it is the wrong approach by judicial fiat to transfer a whole industry from the agricul-

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[23] However, the agricultural exemption of the N.L.R.A. is not measured by the magnitude of the farmer's planting nor the prolificacy of his harvest. *Local Union No. 300* v. *McCulloch*, 428 F.2d 396, 399 (5th Cir. 1970).

tural to the commercial column. This is particularly true where the statute involved makes particular reference to the raising of poultry which is the exact business of these firms.

N.L.R.B. v. *Victor Ryckebosch, Inc.*, 471 F.2d 20, 21 (9th Cir. 1972) says:

> "The social and economic problems related to large-scale corporate farming are more appropriately resolved by debate and committee study in Congress than by adversary proceedings in Court. If Congress is troubled by the reasoning in Strain, it is free to translate its intent into clearer legislation. The N.L.R.B. has not demonstrated that we need create a conflict between the Circuits on this point."

The farmer has been the subject of special legislation for many decades the origins and rationale for which sometimes having no discernible foundation except politics.[24]

The legislature of this country has just recently taken a second look at the farm laws and are in the process of changing them. Maine is an example with a new bargaining act for farmers and modifications of the definition of agricultural employee in the Unemployment Compensation Law. The federal Congress, although in the past affixing the prohibition in the N.L.R.A. against agriculture in an appropriations act, has also begun to modify long standing agricultural laws.

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[24] Clayton Act, 15 U.S.C., § 17 (1970), originally passed in 1914; Capper-Volstead Act, 7 U.S.C. §§ 291-92 (1970), originally passed in 1922; "The committee discussed this matter carefully in executive session and decided not to include agricultural workers. We hope that the agricultural worker will be taken care of... I am in favor of giving agricultural workers every protection, but just now I believe in biting off one mouthful at a time. If we can get this bill through and get it working properly, there will be an opportunity later, and I hope soon to take care of the agriculutral worker". N.L.R.A.'s sponsor, Representative Connery, from Legislative History of N.L.R.A., p. 3202.

In April of 1974 by amendment to the Fair Labor Standards Act, it dealt with the exemption from overtime of businesses which would include many vertically integrated farm operations. It amended Section 13 by adding a 13(g) of the Act restricting the exemption from applying to all commonly controlled establishments whose annual gross volume in sales exceeds ten million dollars.

The point is that if there is a feeling that the large farm organization should be covered by the N.L.R.A., exactly how and which ones should be the prerogative of Congress rather than the courts. This is especially true in this area because the origins are so political. See *Etchechoury* v. *Avi-Simplot, Inc.*, 93 Idaho 438, 462 F.2d 737.

Conclusion

Although Belfast, Maine, may not be regarded as the center of the farm belt, the truth is that it is the center of the Maine poultry industry which makes up a significant segment of the state's economic activity. Maine is the largest poultry state in New England.

Bayside-Poultry Processing is a typical vertically integrated poultry operation. The issue raised herein as to whether or not it and others like it are farmers is important to the industry and most particularly now in light of this court of appeals' decision, to New England.

Wherefore the petitioners pray that this petition for a writ of certiorari be granted and that ultimately the complaint against them be dismissed for want of jurisdiction.

Respectfully submitted,

ALAN JOEL LEVENSON
187 Middle Street
Portland, Maine 04111
Attorney for Petitioners

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 75-1070

NATIONAL LABOR RELATIONS BOARD,

PETITIONER,

v.

BAYSIDE ENTERPRISES, INC.,
PENOBSCOT POULTRY COMPANY,
AND POULTRY PROCESSING, INC.,

RESPONDENTS.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

Robert A. Giannasi, Assistant General Counsel, with whom *John C. Miller*, Acting General Counsel, *John S. Irving*, Deputy General Counsel, *Elliott Moore*, Deputy Associate General Counsel, and *Elinor Hadley Stillman*, Attorney, were on brief, for petitioner.

Alan J. Levenson, with whom *Clarke C. Hambley, Jr.*, and *Levenson and Levenson* were on brief, for respondents.

December 10, 1975

COFFIN, *Chief Judge*. The sole issue in this petition for enforcement of an order of the National Labor Relations Board is whether truck drivers who deliver feed to poultry farms are exempted from the National Labor Relations Act as agricultural laborers. 29 U.S.C. § 152(3). Respondents, Bayside Enterprises, Inc. and Poultry Processing, Inc.[1]

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[1] Penobscot Poultry Co. is a defunct subsidiary which provides the trade name of the company's products.

are parent and subsidiary companies engaged in the production of broilers. Bayside directly controls chick hatchery facilities and several breeding farms. The chicks are raised by contracting farms while Bayside retains title to the birds. Poultry Processing, Inc., the subsidiary, operates a mill which provides feed to the independent farms and to an unrelated poultry company. The subsidiary also operates a processing plant which dresses the grown birds.[2] The employees in question work as truck drivers, transporting poultry feed from the mill to the contract farms.

In October, 1973, Local 340 of the Truck Drivers, Warehousemen, and Helpers of America[3] requested recognition as the collective bargaining representative of the feed truck drivers. Bayside recognized the Union and began contract negotiations. After several sessions, the company broke off negotiations and informed the Union that it was not obligated to bargain because the employees were agricultural laborers and therefore not covered by the Act. In an unfair labor practice proceeding, the Board found that the drivers were not agricultural laborers within the meaning of §2(3) of the Act, and that the respondents had violated §§8(a)(1) & (5) of the Act, 29 U.S.C. §§158(a)(1) & (5), by refusing to bargain with the Union. Bayside's sole contention is that the Board erred in concluding that the drivers were not agricultural laborers.

This court has previously addressed the issue presented in this case. In *NLRB* v. *Gass*, 377 F.2d 438, 444 (1st Cir.

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[2] Poultry Processing, Inc. is a wholly owned subsidiary of Bayside Enterprises, Inc. They share the same corporate officers, and conduct business from the same office. Employees, however, are employed by either Bayside or Poultry Processing. As the operations of the two companies ar highly integrated, we will treat them as one business entity throughout and refer to them jointly as Bayside. *Cf. Witrz* v. *Jackson & Perkins Co.*, 312 F.2d 48, 50 (2d Cir. 1963).

[3] Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America.

1967), we held that feed truck drivers who were employed by an integrated poultry processing company were not agricultural laborers exempt from the Act. Respondents, however, point to several cases from other circuits which hold that employees engaged in similar work are exempt from the Act. *McElrath Poultry Co., Inc.* v. *NLRB*, 494 F.2d 519 (5th Cir. 1974); *Abbott Farms, Inc.* v. *NLRB*, 487 F.2d 904 (5th Cir. 1973); *NLRB* v. *Victor Ryckebosch, Inc.*, 471 F.2d 20 (9th Cir. 1972); *NLRB* v. *Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969). We find these cases both distinguishable and unpersuasive.

Section 2(3) of the Act excludes from the definition of an employee, "any individual employed as an agricultural laborer". Since 1946, riders to the appropriation acts for the Board have regularly provided that the term "agricultural laborer" shall be defined against the background of the Fair Labor Standards Act, 29 U.S.C. § 203(f), which reads:

> "'Agriculture' includes farming in all its branches and . . . includes . . . the raising of . . . poultry, and any practices . . . performed by a farmer or on a farm as incident to or in conjunction with such farming operations . . . ."

The Supreme Court has held that this definition has two distinct parts. *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 762-63 (1949). The first relates to actual farming operations, and the second, "includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm incidently to or in conjunction with 'such' farming operations." *Id.* at 763. The activities included in the second portion of the definition, however, must be incident to the farming operations of the employer, and not the farming of another. *Id.* at 766 n. 15; *Bowie* v. *Gonzalez*, 177 F.2d 11, 18 (1st Cir. 1941).

Respondents do not claim that the truck drivers are performing services within the first branch of the definition of agriculture. Rather, they contend that Bayside is engaged in farming and that the drivers are performing services incidental to that farming. The administrative law judge found that Bayside and its component parts constitute a single employer with common ownership, management and control of labor relations. *See NLRB* v. *Gass, supra; NLRB* v. *Lipman Brothers, Inc.*, 355 F.2d 15, 21 (1st Cir. 1966). As a whole, Bayside is a multi-faceted organization whose enterprises and purposes go beyond the bounds of farming.

The bulk of the capital and personnel of Bayside is devoted to the feed mill and the processing plant operations which are concededly not farming. The company does operate chick hatcheries and breeding farms which do constitute farming under the applicable statutes. 29 C.F.R. §780.125(b) (1974). In the remaining segment of the business, the raising of chickens to maturity, the actual farming activity is done by the contract farmers. According to current Department of Labor regulations, retention of title to the poultry pending maturity on contract farms does not entitle a business to be classified as a farmer. 29 C.F.R. § 780.126 (1974).[4] Nor does Bayside's delivery of feed, however crucial to the development of poultry on the contract farms it may be, justify classifying Bayside as a farmer. Rather, the Bayside feed delivery system is part of a separate organization, supportive of agricultural activity, but not directly

[4] "Feed dealers and processors sometimes enter into contractual arrangements with farmers under which the latter agree to raise to marketable size baby chicks supplied by the former who also undertake to furnish all the required feed and possibly additional items. Typically, the feed dealer or processor retains title to the chickens until they are sold. Under such an arrangement . . . . [t]he activities of the feed dealer or processor . . . are not 'raising of poultry' and employees engaged in them cannot be considered agricultural employees on that ground . . ."

engaged in farming. *See* 29 C.F.R. § 780.126 (1974), *supra* n. 4; *Farmers Reservoir & Irrigation Co.* v. *McComb, supra* at 761.

We therefore conclude that Bayside cannot be classified as a farmer for that portion of its business which supports the raising of poultry on contract farms. Although Bayside is a farmer in relation to the chick hatcheries and breeder farms, the truck drivers are not employed incidental to or in conjunction with this limited farming activity. Consequently, they are not agricultural laborers within the meaning of the Act.

The cases cited by respondents are readily distinguishable by the character of the employing entity. In both *NLRB* v. *Strain Poultry Farms, Inc.*, and *Abbott Farms, Inc.* v. *NLRB, supra*,[5] the employers were primarily engaged in traditional agriculture, and, unlike Bayside, owned no processing plant to dress the poultry. The activities of the employees were found to be incidental to the agricultural functions of their employers. In contrast, Bayside's operations are not predominantly agricultural, and it cannot claim the exemption for most of its employees.

The orders of the Board are enforced.

[5] The other cases cited by the respondents are summary denials of enforcement which rely on *Strain* and *Abbott, McElrath Poultry Co., Inc.* v. *NLRB, supra* (*Abbott*); *Victor Ryckebosch, Inc.* v. *NLRB, supra* (*Strain*).

United States Court of Appeals
For the First Circuit

No. 75-1070

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,
v.
BAYSIDE ENTERPRISES, INC.,
PENOBSCOT POULTRY COMPANY, and
POULTRY PROCESSING, INC.,
RESPONDENTS.

DECREE
Entered December 10, 1975

This cause came on to be heard upon an application for enforcement of an order of the National Labor Relations Board, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The orders of the National Labor Relations Board are hereby affirmed and enforced.

By the Court:
(s) DANA H. GALLUP
Clerk

A True Copy
ATTEST:
(s) DANA H. GALLUP
Clerk

[Cert. cc: N.L.R.B. and Messrs. Moore and Levenson;
cc: Mr. Fuchs.]

APPENDIX B

216 NLRB No. 92 D - 9553
Belfast, Maine

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 1-CA-9721

BAYSIDE ENTERPRISES, INC.,
PENOBSCOT POULTRY COMPANY,
POULTRY PROCESSING, INC.
and
TRUCK DRIVERS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 340, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On September 25, 1974, Administrative Law Judge David S. Davidson issued the attached Decision in this proceeding. Thereafter, Respondents filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

[1] Respondents' request for oral argument is denied as the record and briefs in our opinion adequately present the positions of the parties.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondents, Bayside Enterprises, Inc., Penobscot Poultry Company, and Poultry Processing, Inc., Belfast, Maine, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. FEB 5 1975

JOHN H. FANNING, *Acting Chairman*
HOWARD JENKINS, JR. *Member*
JOHN A. PENELLO, *Member*

(SEAL) NATIONAL LABOR RELATIONS BOARD

JD-629-74
Belfast, Maine

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 1-CA-9721

BAYSIDE ENTERPRISES, INC.,
PENOBSCOT POULTRY COMPANY,
POULTRY PROCESSING, INC.
and
TRUCK DRIVERS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 340, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

S. Anthony di Ciero, Esq., of Boston, Mass., for the General Counsel.
David Cohen, Esq., for Portland, Maine, for the Charging Party.
Alan Levenson, Esq., of Portland, Maine, for the Respondents.

DECISION

STATEMENT OF THE CASE

DAVID S. DAVIDSON, Administrative Law Judge: Pursuant to a charge filed on March 26, 1974, by Truck Drivers, Warehousemen and Helpers Union, Local No. 340, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the Union, a complaint issued on May 7, 1974, and was thereafter amended on June 20, 1974. The complaint, as amended, alleges that Respondents violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the Union as the exclusive representative of feed truckdrivers employed by Bayside. Respondents have filed an Answer and an Amended Answer in which they deny the commission of any unfair labor practices. The principal issue raised is whether the feed truckdrivers employed by Bayside are

agricultural laborers within the meaning of Section 2(3) of the Act.

On June 26 and 27, 1974, a hearing was held before me at Belfast, Maine, at which all parties appeared and had an opportunity to present evidence. At the conclusion of the hearing oral argument was waived, and the parties were given leave to file briefs which have been received from the General Counsel and Respondents.

Upon the entire record in this case, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS AND CONCLUSIONS

I. The Business of the Respondents

Bayside Enterprises, Inc., herein referred to as Bayside, and Poultry Processing, Inc., are Maine corporations having their principal offices in Belfast, Maine. Bayside is engaged in the breeding and raising of poultry, and Poultry Processing is engaged among other things in the dressing and processing of poultry for market. Bayside and Poultry Processing each in the course of its business annually receives goods valued in excess of $50,000 from points outside the State of Maine. Bayside and Poultry Processing concede that each is an employer engaged in commerce within the meaning of the Act, and I find that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of the Act.

III. The Alleged Unfair Labor Practices

A. *The Facts*

1. The refusal to bargain

The Union and Amalgamated Meat Cutters Local 385 jointly represent a unit of Poultry Processing employees including those who work in its processing plant, pick-up crews which pick up poultry from farms for processing, and truck-

drivers. On or about October 21, 1973, the Union requested recognition as representative of drivers employed by Bayside who deliver feed for Bayside to poultry farms. Through one of its officers, Bernard Lewis, Bayside recognized the Union and began to negotiate with it for an agreement. After several meetings, however, Lewis informed the Union that Bayside believed the feed truckdrivers were agricultural employees and that it was not obligated to bargain with the Union for them. Negotiations were terminated on or about December 14, 1973, giving rise to this proceeding.

2. The operations of Bayside and Poultry Processing

Poultry Processing is a wholly owned subsidiary of Bayside. Poultry Processing in turn has several operating divisions, some of which are not located in the Belfast area and have no direct involvement in this proceeding.

Bayside owns and operates two hatcheries and six primary breeding farms on which it develops and raises breeder stock as the source of eggs which are hatched to provide chicks for poultry production. Bayside has agreements with approximately 119 independent farms in the area around Belfast for the care and feeding of chickens from the age of one day until they are ready for processing for the market as broilers, roasters, or capons.

During the time that the chickens are on the farms Bayside determines what they are to be fed and furnishes all necessary feeds and other supplies to the farms. Bayside has employees who visit the farms periodically to determine whether any special care or medicaments may be needed, and they provide supervision to farmers for the care and management of the flock. The farmers provide necessary space for the flocks, storage facilities for supplies, and the labor required to care for the flocks. Title to the chickens remains in Bayside until they leave the farms for processing.

All but a small portion of the poultry raised by Bayside is sold to its subsidiary Poultry Processing and processed for market at Poultry Processing's Belfast plant which operates under the trade name Penobscot Poultry Company.[1] Crews employed by Poultry Processing come to the farms, load the poultry into coops, and truck the poultry to the Belfast plant. At the plant the poultry is weighed, and title is deemed to pass to Poultry Processing at that point. Poultry Processing slaughters, dresses, sells and ships the dressed poultry.

Bayside purchases some feed from a farmers' cooperative of which it is a member,[2] but 80 to 85 percent of its feed needs are supplied by a mill at Thorndike, Maine, operated by Poultry Processing under the trade name Penobscot Feeds. About two thirds of the feed processed by Penobscot Feeds goes to Bayside, and the remaining third is sold to Fort Halifax Packing Co., an unrelated poultry raising enterprise. Since May 1, 1974, Bayside has purchased feed ingredients directly from suppliers and has paid Poultry Processing a milling fee for milling and mixing feed. Poultry Processing purchases the ingredients for the feed sold to Fort Halifax and sells the feed to it. Before May 1, 1974, Poultry Processing purchased all the ingredients and sold feed to both. Feed deliveries to Fort Halifax are made by an independent contractor paid by Fort Halifax. Feed deliveries from Penobscot Feeds to farms under contract with Bayside are made by the feed truckdrivers employed by Bayside whose status is at issue in this proceeding.

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[1] The name Penobscot Poultry Company apparently is owned by Penobscot Poultry Co., Inc., also a wholly owned subsidiary of Bayside, which is no longer an operating corporation and remains only as a corporate shell.

[2] Most of the feed purchased from this source is used on Bayside's own breeder farms or for rooster and capon flocks being raised for Bayside.

Bayside and Poultry Processing have common officers and directors, a common corporate office, and a common controller. In the office two clerical employees are on the payroll of Bayside, and seven are on the payroll of Poultry Processing. The controller, office manager, and an accountant are carried on the payroll of Poultry Processing but do joint work for both corporations. A portion of their cost is charged to Bayside each year. There are numerous transactions between the two corporations, and checks are written transferring funds between the two corporations for each transaction. The persons who sign the checks are the same for both corporations.

Bayside has a broiler department manager who is in charge of all farm activities. Poultry Processing has an operations manager at the processing plant and a manager at the feed mill. These three managers report directly to Herbert Hutchins, general manager of Bayside.

Bernard Lewis, an officer of both corporations has represented Poultry Processing in bargaining, and Bayside General Manager Hutchins has participated in bargaining and the processing of grievances for Poultry Processing. Lewis and Hutchins also represented Bayside in initial dealings between Bayside and the Union relating to the Bayside drivers.

3. The duties of the feed truckdrivers

Bayside employs six feed truckdrivers who work on two shifts, from 3 a.m. to 1 p.m. and from 1 p.m. to 9 p.m. Their principal duty is to deliver feed to the Bayside contract farmers. Bayside also employs a dispatcher who directs the feed truckdrivers and appears to be a supervisor within the meaning of the Act. The dispatcher works closely with and receives direction from Bayside's broiler department manager and from Poultry Processing mill supervisor Merle Weymouth.

Feed is the source of protein for the poultry raised by

Bayside. It consists primarily of corn and soy, but it may have up to 25 other ingredients added to it in varying proportions to provide vitamins, minerals, amino acids, growth stimulation, and medication. After mixing and grinding, feed may be delivered without further processing as mash, with further processing through a steam pressure system as pellets, or after further cracking as crumbles. The exact composition and type of feed fed poultry depends upon the age and health of the birds, outside temperatures, and the type of bird being raised (broiler, roaster, capon).

The broiler department manager makes up a feeding schedule for each flock of birds setting forth the type and composition of the feed to be supplied throughout the growth cycle of the flock. From this schedule the dispatcher makes up a delivery schedule designed to ensure that the farmer at all times has the right amount of feed of the proper variety at the farm to feed the poultry in accord with the schedule. During the growth cycle of a flock, there may be changes in the feeding schedule attributable to a variety of factors. These are communicated to the dispatcher by the broiler department manager. The dispatcher then alters delivery schedules accordingly.

The drivers are given delivery tickets which tell them the type, composition, and amount of feed to be delivered to each farm. At times they load their trucks and at times the dispatcher loads them. The drivers drive from the Thorndike mill to the farms, and unload the feed into farm storage bins. At times farmers orally instruct the drivers as to placement of the feed, but more often the farmers leave notes for the drivers with such instructions. The drivers are expected to unload the proper amounts of feed into the designated bins, to make certain that old feed is shaken to the bottom of the bins to avoid mold, and to keep moisture out of the bins in bad weather. The farmers rely on the drivers to deliver the right quantities of feed

to the right places. Delivery of the wrong feed could affect development of a flock adversely, and a farmer's compensation for raising a flock is affected by the final weight of the flock as well as the cost of feed and other supplies provided by Bayside.

The drivers each make deliveries to three to four farms a day. A small portion of their time is spent at the feed mill with the balance divided rather evenly between travel time and unloading time at the farms. While on the farms, the drivers have no direct contact with the poultry, and may or may not have contact with the farmer on any single visit.

A major problem in raising chickens is disease, and Bayside takes precautions to try to prevent the spread of disease from one farm to another. Because same diseases may be physically transmitted, the drivers are required to follow specified sanitation procedures upon arriving at and leaving each farm and upon arriving back at the feed mill. Each driver carries disinfectant, a pail, a foot pan, a water bucket, and a sprayer in his truck. Before leaving his truck to unload, he must wash his boots. Upon leaving each farm he must spray the truck tires and scrub his boots. When he arrives back at the mill he must wash the under carriage of his truck. Comparable precautions are required of all those who enter the farms, including the Poultry Processing crews which remove flocks from the farms for slaughter and processing. Since chickens are sensitive to unusual noises and flashes of light, the drivers must drive slowly and quietly while on the farms and avoid reflections of light from their trucks into the poultry houses.

On occasion in the past Bayside feed drivers have picked up feed from Bayside's other source, the farmers' cooperative, and have delivered it to Bayside's farms. However, for the most part feed from that source is de-

livered to Bayside's farms by drivers employed by the farmers' cooperative. Bayside's drivers make practically all deliveries of feed from the Thorndike mill to Bayside farms, but in the event of equipment failure, Bayside utilizes an independent contractor, Richard Hodges, to make feed deliveries from the Thorndike mill to the contract farmers. Hodges is regularly used by Fort Halifax Packing Co., to make deliveries from the Thorndike mill to its farms. Bayside's feed drivers in the past have occasionally but infrequently been used to haul feed ingredients from suppliers in Gloucester, Massachusetts and Rockland, Maine to the Thorndike mill.

B. *Concluding Findings*

The only issue in this case is whether the six feed truckdrivers are agricultural laborers within the meaning of the Act. If they are, Bayside had no obligation under Section 8(a)(5) of the Act to bargain with the Union with respect to them. If they are not agricultural laborers, Bayside in effect concedes that they constitute an appropriate unit for collective bargaining, that the Union represents them, and that Bayside is obligated to bargain with the Union with respect to their wages, hours, and working conditions.

Section 2(3) of the Act excludes from the definition of an employee "any individual employed as an agricultural laborer." Since 1946 riders to the appropriation acts for the Board have regularly provided that the term "agricultural laborer" shall be defined in accordance with Section 3(f) of the Fair Labor Standards Act (29 U.S.C. §203) which reads:

> Agriculture includes farming in all its branches and . . . includes . . . the raising of . . . poultry, and any practices . . . performed by a farmer or on a farm as an incident to in conjunction with such farming operations.

The General Counsel contends that the operations of Bayside and Poultry Processing constitute a single integrated enterprise, that those operations as a whole do not constitute farming within the meaning of the Fair Labor Standards Act, and that the feed truckdrivers are neither engaged in farming nor do they perform duties incidental to or in conjunction with farming. Bayside contends that it is engaged in farming, that its operations are separate from those of Poultry Processing, and that in any event its feed truckdrivers perform duties incidental to or in conjunction with farming.

The issue in this case is not novel. In several decisions the Board has considered the status of feed truckdrivers and other drivers performing services for poultry raising enterprises similar in whole or in part to those of Bayside. The Board has generally found such drivers to be employees within the meaning of the Act.[3] Although Courts of Appeals for the Fifth and Ninth Circuits have expressed disagreement with the Board's conclusions in these decisions, the Court of Appeals for the First Circuit has enforced one of these decisions and to this point the Board continues to adhere to the approach expressed in them.[4]

The reasoning of the Board is set forth in detail in these decisions and need not be retraced here. It seems clear that following these decisions the Board woud not regard Bayside's operations in the aggregate as farming and would not view the feed drivers as directly engaged in farming

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[3] *Samuel B. Gass, et al.*, 154 NLRB 728, enf'd 377 F.2d 438 (C.A. 1); *Strain Poultry Farms, Inc.*, 163 NLRB 972, enf. denied 405 F.2d 1025 (C.A. 5); *Victor Ryckebosch, Inc.*, 189 NLRB 40, enf. denied 471 F.2d 20 (C.A. 9); *Abbott Farms, Inc.*, 199 NLRB No. 60, enf. denied 487 F.2d 904 (C.A. 5); *Imco Poultry Division of International Multifoods Corporation*, 202 NLRB No. 44; *McElrath Poultry Co., Inc.*, 206 NLRB No. 94, enf. denied 74 L C ¶10,060 (C.A. 5).

[4] See *Imco Poultry, Division of International Multifoods Corporation, supra*, at p. 6, n. 11.

or in the performance of duties incidental to or in conjunction with farming.

While Bayside contends that it is an agricultural enterprise, Bayside is much more than that. True, it owns and directly operates hatcheries and farms, and these activities undoubtedly qualify it for membership in a farmers' cooperative and for designation as an agricultural enterprise for certain other purposes. But Bayside's operations are, as contended by the General Counsel, highly integrated with those of its subsidiary Poultry Processing, and the evidence set forth above clearly supports the conclusion that they constitute a single employer for purposes of the Act. There is common ownership, management, and control of labor relations, and close interrelation and integration of operations. Taken together Bayside and Poultry Processing constitute a multifaceted organization whose enterprises and purposes go far beyond the bounds of traditional farming. While Bayside's own farms and hatcheries may constitute branches of farming, the overall operations of Bayside and Poultry Processing, and more specifically the feed mill and feed delivery operations, may not be removed from coverage by the Act by utilizing these aspects of Bayside's operations which are traditional branches of farming to characterize Bayside's entire operation as farming.[5] It is also self-evident that the drivers themselves are not engaged directly in farming in the performance of their duties.

The question remains whether the delivery of feed to the farms under contract to Bayside should be considered the performance of practices on a farm incidental to or in conjunction with farming. The General Counsel contends, and I believe correctly, that the facts in this case are indistinguishable from those in *Samuel B. Gass, et al., supra,* in which the Board with the agreement of the First

[5] *McElrath Poultry Company, Inc., supra,* at p. 3-4.

Circuit held that feed truckdrivers duties were incidental to the operation of the feed mill rather than to the operation of any farm. While superficially *Gass* may be distinguished in that there the drivers were employed by a separate corporation which acted ostensibly as an independent contractor to haul feed, that corporation was found to constitute a joint employer of the drivers along with several other integrated corporations found to be a single employer and engaged in an enterprise substantially the same as that of Bayside and Poultry Processing. The facts in *McElrath Poultry Company, Inc., supra,* also are indistinguishable on any meaningful basis from those in this case.

Bayside contends that these decisions rest on an assumption that the delivery of feed is similar to the delivery of electricity or water, that the evidence in this case shows that assumption is unwarranted, and that *Gass* should not be followed for that reason. Bayside relies on the evidence that feed truckdrivers must take precautions to avoid transmission of disease, unusual noises and sudden reflections of light in the delivery of feed, and must deliver the right kind of feed to the right bin in the right amount while exercising care to see that old feed is shaken to the bottom of the bin and that precipitation does not get into the bins. Of course, there are differences between the delivery of feed and electricity and water, but these differences cannot be presumed to have been unknown to the Board in the past[6] do not involve more than routine action on the part of the drivers, and do not involve the performance of duties bearing any special relationship to farming. The enumerated aspects of the drivers duties do not alter the basic character of their duties.

[6] See *Victor Ryckebosch, Inc., supra,* at 42, n. 4; see also *McElrath Poultry Company, Inc., supra,* at p. 4, n. 6.

Following *Gass* and *McElrath* I conclude that the feed truckdrivers employed by Bayside are not agricultural laborers but are employees within the meaning of the Act. As there is no issue as to unit, majority, or withdrawal of recognition, I further conclude that the Union is the exclusive representative of the drivers and that Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union for them.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondents, Bayside Enterprises, Inc., and Poultry Processing, Inc., set forth in section III, above, occurring in connection with the operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondents Bayside Enterprises, Inc., and Poultry Processing, Inc., engaged in certain unfair labor practices, I shall recommend that they be required to cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

Conclusions of Law

1. Respondents Bayside Enterprises, Inc., and Poultry Processing, Inc., constitutes a single employer and are engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All feed truckdrivers of Respondent Bayside Enterprises, Inc., employed out of its Thorndike Maine, location, excluding all office clerical employees, professional employees, guards, and all supervisors as defined in the

Act, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times since on or about October 21, 1973, the Union has been and now is the exclusive bargaining representative of the employees in said unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to meet with the Union to engage in collective bargaining since on or about December 14, 1973, Respondents have engaged in and are engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[7]

ORDER

Respondents, Bayside Enterprises, Inc., and Poultry Processing, Inc., their agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment with Truck Drivers, Warehousemen and Helpers Union, Local No. 340, a/w International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, as the exclusive representative of the employees in the appropriate unit described in paragraph 3 of the section of this Decision entitled "Conclusions of Law."

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[7] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing their employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain with the Union as the exclusive bargaining representative of the employees in the previously described appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at their Thorndike, Maine, place of business copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondents' authorized representative, shall be posted by them immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 1, in writing, within 20 days from the receipt of this Decision, what steps Respondents have taken to comply herewith.

Dated at Washington, D.C.

(s) DAVID S. DAVIDSON
DAVID S. DAVIDSON
Administrative Law Judge

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[8] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX C

BAYSIDE ENTERPRISE, INC.

153 High Street
Belfast, Maine
Contract

BAYSIDE ENTERPRISES, INC., AND ———————
EXCLUSIVELY; BROILER, ROASTER AND CAPON CONTRACT.

This contract made this ——— day of ———————, 19——, between Bayside Enterprises, Inc. of Belfast, hereafter referred to as "Bayside" and ———————, referred to hereafter as the "Grower". Bayside will deliver baby chicks to the Grower's farm at ———————, Maine to be grown out as either Broilers, Roasters, or Capons. The number of baby chicks to be placed on the farm and the Growing Program to be followed will be determined by Bayside. The Grower will give his best care and management to the growing of chicks placed on the farm in accordance with Bayside's Feeding and Management Programs. This contract shall remain in effect, with the following provisions, for successive flocks as may be placed by mutual agreement.

BAYSIDE AGREES:

Section A:

1.) To furnish all chicks, feed, fuel, litter, medicaments, and vaccines.
2.) To provide supervision in the care and management of the flock.
3.) To be the sole judge in determining when a facility shall be sprayed or washed and is adequately prepared for the placement of another flock.

4.) To pay for spray, power wash, and disinfectants used as such which then become apart of the Grower's total cost of production, except the cost of powerwash before and/or following a flock of Capons. A Grower with proper equipment may wash or spray his own facility, (or pay to hire this service), for which no charge will be assessed against the flock concerned.

5.) To furnish the Grower with copies of all charge slips for feed, fuel medicaments, litter, wash and spray, poultry weight tickets, and bonus calculation sheets.

Section B — To Guarantee the Broiler Grower:

1.) A payment of $0.01 per square foot for the cleanout period within 10 days after a subsequent Bayside flock is placed.

2.) A payment of $0.007 per square foot per week to be paid bi-weekly during the growing period.

3.) A "Balance of Guarantee Payment", within 10 days after the flock is marketed, to equal $0.01225 per square foot per week. (This total includes 1 & 2 Above.)

4.) A "Bonus Payment" based upon an equal increment spread from the lowest cost flock maximum of $0.01775 per square foot per week to a minimum of $0.01225 per square foot per week to the highest cost flock settling within a given settlement period. (This total includes 1, 2, & 3 above.)

5.) An additional "Electric Power Payment", within 10 days after the flock is marked, equal to $0.0005 per square foot per week. This payment to be for Windowless facilities with fan capacities and equipment in accordance with Bayside specifications.

Section C — To Guarantee Roaster Growers:

1.) A payment of $0.01 per square foot for the cleanout period within 10 days after a subsequent Bayside flock is placed.

2.) A payment of $0.007 per square foot per week to be paid bi-weekly during the growing period.

3.) A "Balance of Guarantee Payment", within 10 days after the flock is marketed, equal to $0.0125 per square foot per week. (This total includes 1 & 2 above.)

4.) A "Bonus Payment" based on an equal increment spread from the lowest cost flock maximum of $0.0185 per square foot per week to a minimum of $0.0125 per square foot per week to the highest cost flock settling within a given settlement period. (This total includes 1, 2, & 3 above.)

5.) An additional "Electric Power Payment", within 10 days after the flock is marketed, equal to $0.0005 per square foot per week. This payment to be for Windowless facilities with fan capacities and equipment in accordance with Bayside specifications.

Section D — To Guarantee the Capon Grower:

1.) A payment of $0.01 per square foot for the cleanout period within 10 days after a subsequent Bayside flock is placed.

2.) A payment of $0.01 per square foot per week to be paid bi-weekly during the growing period.

3.) A "Balance of Guarantee Payment", within 10 days after the flock is marketed, to equal $0.0135 per square foot per week. (This total includes 2 above.)

4.) An additional "Electric Power Payment", within 10 days after the flock is marketed, equal to $0.0005 per squire foot per week. This payment

to be for Capon Growers with Windowless facilities in accordance with Bayside specifications.

THE GROWER AGREES:

Section E:

1.) To furnish adequate housing, equipment, water, labor, feed, and oil storage facilities as necessary for an efficient operation, as in accordance with Bayside specifications. (See specification sheet attached.)

2.) To maintain an effective rodent and wild bird control program.

3.) To provide State approved disposal facilities for dead birds.

4.) To have no poultry other than Bayside's on the farm during the period of this contract.

5.) To use only those materials supplied by Bayside for the purpose of feeding and maintenance of birds under this contract.

6.) To provide suitable facilities for water medication.

7.) TO BE PRESENT DURING THE LOADING OUT OF POULTRY.

8.) To keep an accurate flock inventory, on sheets provided by Bayside, and to have these sheets available to the "Load Out Foreman" when poultry is loaded.

9.) To maintain suitable roadways for feed, fuel and chick deliveries and for the efficient load out of flocks. To pay all wrecker service as required by live haul, chick, feed, or fuel delivery trucks as attributed to unsuitable roadways on Grower's farm.

10.) To follow instructions of the Bayside Supervisor in the care and management of Broiler, Roaster

or Capon flocks. To allow such personnel to enter any facility pertinent to this contract at reasonable times.

11.) That Bayside will remain the owner of all poultry, feed, and other materials, and may without process of law, enter on the premises of the Grower to remove or to assume the active care and management of the flock—if Bayside believes that said flock is not receiving proper care and attention. Cost of labor or other expenses thus incurred will be deducted from the contract payment.

12.) To pay a charge of $10.00 per ton for the removal of any feed left on the farm, in "excess" of a calculated 1 day supply at the time a flock is removed. A one day supply will be considered 200 lbs. per 1,000 Broilers and 300 lbs. per 1,000 Roasters and Capons. Feed left on the farm due to schedule changes shall not be considered "EXCESS".

13.) That a prorated payment will be made based upon respective guarantees—in lieu of Sections B, C, & D—the payment will be prorated on the basis of average mortality within a settlement, original flock density, and actual percentage salvaged when excessive bird losses resulted from:

a.) An act of God (including, but not limited to, fire, winds, snow, or flooding).

b.) OR, over 4% in excess of the average die as a result of lack of oxygen and/or heat exhaustion.

14.) That minimum payment will be set at $0.0075 per square foot per week in cases described under Item 13 above.

SETTLEMENT COST ANALYSIS:

Section F:

Charges for monthly cost caluculations will be as follows:

1.) Broilers—Chix		$0.15
	Feed	$100/Ton
	Fuel	$0.20/Gal.
	Medicaments	Per Type
	Litter	$8.00/Cord
	Wash and Spray	Invoice Charge
2.) Roasters—Chix		$0.15
	Feed	$100/Ton
	Fuel	$0.20/Gal.
	Medicaments	Per Type
	Litter	$8.00/Cord
	Wash and Spray	Invoice Charge

Age to Weight Adjustment factor—$0.00010 per .01 lb. above and below average ROASTER MALE weight. (See attached example.)

BAYSIDE AND THE GROWER MUTUALLY AGREE:

Section G:

1.) That the Grower accept full and exclusive liability for the payment of any and all taxes arising as a result of the performance of this contract including, but not limited to, any and all taxes for Workmen's Compensation Insurance, or Old Age Benefits or Annuities now or hereafter imposed by any persons engaged in the performance of this Agreement on behalf of the Grower, but excluding local taxes on birds.

2.) That the Grower, his agents and employees shall not be considered to be employees of Bayside for any purpose whatsoever.

3.) That this contract supercedes and replaces all previous Broiler, Roaster and Capon contracts.

4.) That this contract may be cancelled for sustained inferior performance, or violation of the terms of this contract by either party.

5.) That notice of contract termination will be given for a subsequent flock five weeks prior to removal of the preceding flock by either party.

IN WITNESS WHEREOF, the parties hereto have executed these presents this _____ day of _____, 19__.

BAYSIDE ENTERPRISES, INC.

BY: _____

GROWER: _____

_____

Witness

Supreme Court, U. S.
FILED
JUL 2 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1267

BAYSIDE ENTERPRISES, INC.,
PENOBSCOT POULTRY COMPANY,
AND POULTRY PROCESSING, INC.,
PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 8, 1976
CERTIORARI GRANTED MAY 19, 1976

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
Washington, D.C.

Case No. 1-CA-9721

BAYSIDE ENTERPRISES, INC.
PENOBSCOT POULTRY COMPANY
POULTRY PROCESSING, INC.
and
TRUCK DRIVERS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 340 a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

3.26.74	Charge filed.
5. 3.74	Amended Charge filed.
5. 7.74	Complaint and Notice of Hearing, dated.
5.14.74	Answer of Respondents, dated.
6.20.74	Amendment to Complaint, dated.
6.21.74	Amended Answer to Complaint and Amended Complaint dated.
6.26.74	Hearing opened.
6.27.74	Hearing closed.
9.24.74	Administrative Law Judge's Decision issued.
10.15.74	Respondents' exceptions to the Administrative Law Judge's Decision and Request for oral argument, received.
2. 5.75	Board's Decision and Order, dated.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 75-1070

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,
v.
BAYSIDE ENTERPRISES, INC.,
PENOBSCOT POULTRY COMPANY, and
POULTRY PROCESSING, INC.,
RESPONDENTS.

NO. BELOW: 1-CA-9721
DATE OF JUDGMENT: February 5, 1975
NOTICE OF APPEAL FILED: [Application for Enforcement]

DOCKET ENTRIES

1975

Feb. 27 Application for enforcement filed.
Mar. 3 Appearance of Alan Levenson for respondents filed.
4 Petition to transfer filed by respondents.
6 Appearance of Eliott Moore filed for petitioner.
11 Order (Coffin, Ch.J.) transferring case to Fifth Circuit upon motion of petitioner. Notices mailed. File transferred to the Fifth Circuit along with certified copy of docket entries.
19 Opposition of petition filed as a motion for reconsideration. Order (Coffin, Ch.J.) setting aside order of March 11, 1975. Notices mailed. File returned from Fifth Circuit.
25 Order (Coffin, Ch.J., McEntee and Campbell, JJ.) reinstating order of March 11, 1975 and transferring case to Fifth Circuit. Opinion of the Court per curiam. Notices mailed. File transferred to the Fifth Circuit along with certified copy of docket entries.

1975

June 4 Record on transfer from Fifth Circuit filed and case reactivated.
9 Certified list filed.
July 9 Motion filed. Order (Coffin, Ch.J.) enlarging time for filing brief for petitioner and appendix to and including August 13, 1975. Notices mailed.
16 Appendix to briefs filed.
17 Certified record and two reproduced copies of transcript of testimony filed.
Aug. 11 Motion filed. Order (Coffin, Ch.J.) enlarging time for filing brief for petitioner to and including August 20, 1975. Notices mailed.
20 Brief for petitioner filed.
22 Certified copies of two pamphlets of U.S. Dept. of Agriculture filed.
Sept. 4 Motion filed. Order (Coffin, Ch.J.) enlarging time for filing brief for respondents to Sept. 25, 1975, and directing that case remain on October list. Notices mailed.
25 Brief for respondent filed.
29 Assigned for hearing at the October, 1975 session.
Oct. 7 Heard by Coffin, McEntee & Campbell, J.J.
8 Appearance of Robert A. Giannasi, filed for petitioner.
Dec. 10 Decree: The orders of the National Labor Relations Board are hereby affirmed and enforced. Opinion of the court by Coffin, Ch.J. Notices mailed.
22 Verified bill of costs filed.

1976

Jan. 6 Taxation of costs entered. Notices mailed.
Mar. 12 Notice of filing petition for certiorari 3/8/76 (75-1267).
June 1 Order of Supreme Court allowing certiorari 5/19/76.

STENOGRAPHIC TRANSCRIPT OF PROCEEDINGS

[1] BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

Case No. 1-CA 9721
In the Matter of:
BAYSIDE ENTERPRISES, INC.
PENOBSCOT POULTRY COMPANY
POULTRY PROCESSING, INC.
and
TRUCK DRIVERS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 340 a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

District Courthouse
Congress Street
Belfast, Maine
Wednesday, June 26, 1974

The above-entitled matter came on for hearing, pursuant to Notice, at 10:00 o'clock a.m.

BEFORE:

DAVID S. DAVIDSON, Administrative Law Judge

APPEARANCES:

S. ANTHONY DICIERO, Esq.	National Labor Relations Board, Region 1, 15 New Chardon Street, Boston, Mass., appearing as Counsel for the General Counsel.
DAVID COHEN, Esq.,	Law firm of Preti & Flaherty, 443 Congress Street, Portland, Maine, appearing for the Charging Party.

[2] ALAN LEVENSON, Esq., Law firm of Levenson and Levenson, 187 Middle Street, Portland, Maine, appearing on behalf of the Respondent.

• • •

[18] CARL FENWICK

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. diCiero) Mr. Fenwick, would you state your full name and address for the record, please? A. Carl Fenwick, R.F.D. 1, Oakland, Maine.

Q. Are you familiar in any way with Fort Halifax Packing Company? A. Yes, I am.

Q. What is your capacity there?

• • •

[19] Q. Just briefly tell us what is Fort Halifax Packing Company, Mr. Frenwick? A. It's a poultry processing company. It is involved in raising and processing poultry in the State of Maine.

Q. And does Fort Halifax Packing Company have a feed mill operation? A. No, it does not.

• • •

Q. (By Mr. diCiero) Withdraw that question. Does Fort Halifax Packing Company have chickens that are raised by independent farmers around the State of Maine? A. Yes, they do.

Q. Is Fort Halifax Packing Company obligated to supply feed to those chickens. A. Yes.

Q. You have no feed mill operations? A. No, we don't.

Q. From whom does Fort Halifax Packing Company get

its feed? A. We purchase our broiler feed from Penobscot Feeds.

[20] Q. Do you know where that is located? A. Thorndike.

Q. Who delivers the feed? A.We have a contract hauler. His name is Richard Hodges.

Q. And where is he from? A. Unity, I believe.

Q. Unity, Maine? A. Yes.

Q. Tell us what that operation involves. A. He picks up feed at the mill in Thorndike and delivers it to our farms throughout the area where we raise birds.

Q. Have you checked your records, and the records that are with you today, can you tell us how many pounds of feed Fort Halifax Packing Company has purchased from the period January 1, '73 through today? A. Yes, I can. The amount purchased from January 1, '73 through I think it's June 13 of this year is 120,000,000, slightly in excess of that figure, 120.9 million pounds—I believe.

Q. Do you know what the total value in dollars was that? A. Yes, that's about $9.9 million dollars.

Q. And what percentage is that of the total feed requirements for Fort Halifax Packing Company? A. At the present time it's 100% of our broiler feed requirements. We did have another source of feed, but I don't believe we're using it presently. So I believe at the [21] present time its 100% of the broiler feed.

Q. You get from Penobscot Feed in Thorndike, Maine? A. That's correct.

Q. Is there also something Fort Halifax Packing Company sells to the Thorndike mill? A. Yes, it's a by product of our poultry operation, offal and feathers.

• • •

[22] Q. Does Fort Halifax Packing Company have anything to do other than as you have described, with Mr. Hodge, the contract hauler? Is that an independent operation? A. Yes, sir, it is.

Q. It's not a part of your company at all? A. No, it isn't.

• • •

[26] *Redirect Examination*

Q. (By Mr. DiCiero) Mr. Fenwick, you were talking on cross-examination and you mentioned a farm company and a processing company. Fort Halifax Packing Company, is that the parent corporation? I'm confused—do you have different corporate names? A. We have two corporate entities.

Q. What are they? A. Fort Halifax Packing Company is the processing plant, and we have Fort Halifax Poultry Company, which is the grower or the farm operation, the operation on which we raise the birds on a contract basis.

Q. Are these two corporations, are they owned by the same group? A. The poultry company is a subsidiary, a wholly owned subsidiary of the packing company.

Q. So when you say that they sell birds to the processing [27] company, there is actually a contract and they actually pass money back and forth? A. We do write a check for it, yes, sir.

Q. Is it part of your bookkeeping operations? A. Yes.

• • •

Judge Davidson: Do you know if there is separate management or common management?

The Witness: Common management.

• • •

[29] HERBERT HUTCHINS

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Levenson) Mr. Hutchins, you are employed by whom? A. Bayside Enterprises.

* * *

[30] Your office is where? A. 153 High Street.

Q. Could you tell us briefly, or not briefly, what Bayside Enterprises is and what it does and all of the preparations? A. Bayside Enterprises is a corporation that grows meat poultry—broilers, roasters, capons and produces hatching eggs from breeder flocks for production of the meat breeders. To accomplish this, we operate a pedigree breeding operation which is a grandparent operation and its basic function is to select or breed lines of birds; they may be cross-mated to produce the parents that produce the eggs, broilers and roasters. With this function, they produce breeding stock for themselves and they produce hatching eggs for themselves, as well as buying hatching eggs from other people when we don't have enough.

Some of the production of this unit is sold to other poultry companies, either breeding stock or hatching eggs. After the eggs are laid or produced on the farm, they are collected and moved to one of two hatcheries, either the pedigreed breeding hatchery or a commercial hatchery, which would produce the meat type chicks, broilers or roasters.

The hatchery hatches these and moves them to growing farms. We have somewhere around 139 farms that we function with. A portion of these are company owned operations. From here the birds are grown and fed feed that we purchase [31] from Penobscot Feeds, or some other location. We also buy feeds from other companies.

These birds are grown and they are sold to Poultry Processing or some other persons. We sold some to the person who was here this morning. We sold some in Canada.

* * *

[32] Q. Would you clear up this question for us about who is who here—Penobscot Poultry and Poultry Processing? A. Poultry Processing Incorporated is a corporate

structure that operates the processing plant and its procurement system, which means the trucking operation at this plant and out from the plant. And it has related operations like a garage that just functions as a supplement to Poultry Processing.

The poultry is sold as Penobscot brand poultry and it operates and does business as Penobscot Poultry Company.

Q. But who is it really? A. It's Poultry Processing, Incorporated.

* * *

Q. And what about this Penobscot Feed? A. Penobscot Feeds is a feed milling operation that produces feed for sale to Fort Halifax Poultry Company and for sale to Bayside Enterprises.

Q. My question is, who is Penobscot Feeds? Is that a trade name? A. Penobscot Feeds is a trade name; it's Poultry Processing.

Q. So is it a fair statement to say Poultry Processing is both [33] Penobscot Feeds and Penobscot Poultry Company? A. Yes.

* * *

Q. We'll let that pass.

You have spoken about the fact that you sold live poultry, as a matter of fact, that's all you sell is live poultry? A. Yes.

Q. When and where does title pass? A. The live poultry?

Q. Yes. A. Live poultry is sold to Poultry Processing or, in tonight's case, to Fort Halifax Packing Company, at the growing farm. And it's loaded on trucks at that point. The volume of the trade is determined when it's weighed on the scale, either in Belfast or in an agreeable location. That's when title passes.

Q. But in any event, Poultry Processing picks up the poultry at the farms of Bayside, is that right? A. Yes.

Q. And the same with these other processing plants? [34] A. What do you mean?

Q. Well, how do these other processing plants get their live poultry? A. The processing plants pick the poultry up on the farms, I believe.

Q. You said that the operation consists of two hatcheries? A. Yes.

Q. One hatchery for pure bred? A. It's a pedigreed, grandparent type operation.

Q. Pedigreed birds and what is the other? A. It produces meat-type chicks, broiler hatchery, breeder.

Q. Could you just give me a little detail about what happens on these particular hatcheries? A. The breeder hatchery serves as a part of a primary or base breeding operation, and its function is connected with four or five primary breeding farms which breed and select strains or lines of birds. It could be that we're breeding four strains of birds, two on a male side and two on a female side, so that you will produce four lines of birds to be mated with each other to come out in the end with what we would call a strain cross breeder.

A strained cross breeder is a type of breeder that is used in the broiler or roaster production business. The function of the grandparent operation with the primary farms, the pedigree farms and the hatchery are to produce parent [35] lines for the broiler and roaster operations.

Q. To do this, don't you have to have somebody who is an expert? A. Yes, we have a geneticist, Mr. Richard Coscoe, and he has people that work for him that manage the farms, plus a fellow that helps with the selection work.

Q. Selection of what? A. Selection of the basic breeders and the traits they would like to select.

Q. So Mr. Coscoe works out which types of strains to produce, is that a fair statement? A. He controls the

genetic composition of the strains through his selection program and computer program and mathematical work.

* * *

A. The pedigree primary breeder operation was established probably in 1948 by buying eggs or chicks of strains from other breeders. Since this time its been basically a closed operation where the selection has gone on within these strains and the genetic rearrangement has gone on within these [36] strains. At times, you might buy an outside breeding stock to try to select or extract certain genes out of the other strains and inject them into your own. But basically it's a straight closed strain breeding operation and you get genetic rearrangements through your selection.

Q. What about the other one? A. The commercial hatchery?

Q. Yes. A. Its only function is to take in eggs and hatch chicks.

Q. And they get the eggs from where? A. They get the eggs from what we would call commercial breeder farms or broiler breeder farms or roaster breeder farms, or they might purchase the eggs from someone else. At times we've purchased eggs from the gentleman who was here before.

Q. So you have breeder farms producing eggs? A. Yes.

Q. Would you tell us a little bit about those? You said you've got 137— A. That includes the total farm operation, I believe. I believe we're involved with 17 egg producing operation, 6 of which are part of the operation we just discussed and 11 produce eggs from breeding stock that we have purchased from someone else or gotten from our pedigree operation.

Q. So of the 136 farms you have 12 commercial breeders and [37] 5 pedigree? A. Five or six, yes.

Q. Five or six pedigree breeding farms. That will make approximately 119 farms. What goes on there? A. These

produce or grow broilers and roasters for Bayside Enterprises.

Q. What type arrangement do you have with these farms? A. We have a growing agreement with the owners of the firm which basically pays them for use of the facility, services rendered.

Q. Mr. Hutchins, I show you this exhibit marked for the purposes of identification, Respondent's Exhibit 1, and ask if you can identify it?

(The document above-referred to was marked Respondent's Exhibit No. 1 for identification.)

A. Yes, this is a Bayside Enterprises broiler-roaster and capon production contract for agreement.

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Voir Dire

Q. (By Mr. diCiero) Mr. Hutchins, is this a complete contract? [38] A. Yes. The only thing that would be in addition to this with the growers would be a specification sheet and a management directive on how the birds should be handled.

Q. And how about schedules for costs and so forth, isn't that usually a part of that? A. I guess I don't understand what you mean.

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[39] Q. I'm saying a schedule of how it's supposed to be paid? A. You mean an explanatory type thing?

Q. That is correct, sir, yes. A. An example of how a calculation would be made?

Q. Yes. A. It might or might not be attached. It's not usually attached, no.

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Direct Examination (Resumed)

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[40] The contract states that medicaments or medicine—what type of service, how does that actually work on the farms? A. Bayside employs a broiler-roaster production manager who has under his direction three or four field supervisors which call periodically on these farms on a routine basis or on a basis as the grower feels that he has a problem and needs their attention. And he will observe the particular case and, if necessary, transport specimens to a diagnostic [41] laboratory and he and the diagnostician or a veterinarian would prescribe what medicament might be necessary.

Q. Is it a fair statement to say that if the flock gets sick that some action is taken on your part? A. Yes.

Q. Would you tell us about what happens and give us an example? A. If the serviceman or field supervisor recalled or the parent rehad a case of clinical cocksidiosis, which is a protozoan disease, he would recommend a therapeutic treatment for this which would be provided either through the water or through diet.

Q. Does that require a different type of feed? A. Yes, it would.

Q. On that subject, are there many different types of feed? A. Yes.

Q. Would you tell us about that? A. Feeds are basically formulated or designed nutritionally to fit the type of bird in age that is being fed to, for example, let's talk about broilers. Feed is given to broilers, a feed from zero to two weeks of age. Another feed from two to five or six weeks of age, a different feed from six to nine weeks of age, a feed for a period of time five days prior to slaughter which is a different feed. And then, if they weren't slaughtered, and went beyond this point, they would [42] receive

a feed until 12 or 13 weeks of age and then a feed prior to slaughter. The types of medicaments or additions of drugs to feed are controlled by the food and drug regulations.

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Q. I know that there are many different ingredients. How would you classify what goes into this feed? A. There are several protein ingredients, animal protein ingredients. There are vegetable protein ingredients plus [43] basically energy sources which would be corn and yellow grease plus minerals, vitamins, amino acids, trace minerals plus a growth stimulator.

Q. Do you have occasion to change the formula for other reasons than what you just listed? A. Yes.

Q. Would you tell us what reasons you might have to change the formula? A. The formula would be changed to meet different nutrient specifications which might be determined by the strain of birds being utilized, by the age of birds being utilized, by the general health situation of the birds, by the temperature and by the availability of these ingredients or substitutes and the price.

Q. Would the weather have anything to do with whether or not you would change? A. Yes.

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[44] Q. (By Mr. Levenson) Mr. Hutchins, would you explain to us [45] the set up with regard to the purchase and the milling of the grain at the Thorndike Mill for Bayside? A. Bayside Industries pays Penobscot Feed a total milling charge for mixing a specified diet. Bayside Enterprises purchases the inventory for such a formula on the basis of your own projected requirement which is based upon the number of birds and their age on the farm.

Q. So it's a fair statement to say Bayside purchases the major ingredient, which I suppose is the corn — A. Corn and soy make up on this diet 80%.

Q. And in addition what about the medicine, who purchases that? A. Bayside would purchase it.

Q. And the charges made against Bayside in favor of Poultry Processing to mill it at the Thorndike mill, is that the way it works? A. Yes.

(The document above-referred to was marked Respondent's Exhibit No. 4 for identification.)

Q. I show you this piece of paper marked for purposes of identification Respondent's Exhibit 4 and ask that you would identify it. A. This is a broiler, roaster, capon feeding schedule effective June 3, 1974 and it specifies the type of feed to be fed and the quantities of the various agents of the birds [46] listed here.

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VOIR DIRE

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The Witness: Bayside Enterprises feeding schedule bears the initials RLD, which is Robert L. Desrosiers, who is a broiler meat production manager for Bayside Enterprises. He decides what will be fed to these birds. He sends a copy of this [47] to HCH, which is Herbert C. Hutchins, general manager of Bayside.

He sent a copy to Richard A. Coscoe, who is the breeder department manager and geneticist for Bayside. He sent a copy of the letter to Russell Lord, who is Penobscot Feeds manager. He sent a copy to Bayside dispatcher at the feed mill.

Q. (By Mr. diCiero) Who is what? A. William Plamonden. And he sent a copy to a service man which would include four people not listed here which are broiler roaster and breeder service men.

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Q. Do you know each of those names?

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Direct Examination (Resumed)

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[48] Q. It is important that a particular farm get the right crumble pellets or mash. A. Yes, very important.

Q. Why? A. It's very important when the birds are young they get a pre-starter or a starter feed which carries added fortification as far as vitamins and trace minerals and the quality of ingredients, which is the higher priced diet. And maybe a medicament if we have had a problem in the breeder hatchery over [49] the breeding starts. As the birds become progressively older, which is described on this schedule, then the form of the feed and the composition changes.

Mr. DiCiero: By "this record" I think he is referring to Respondent's Exhibit No. 4.

The Witness: These changes are described on the left, are changes in composition or formulation and nutrient density as they go down the page. It is also quite important legally that they get the right feeds because there must be a withdrawal period here where no restricted component is being fed to the birds before processing for human use.

For instance, this feed has a narcinical in it which cannot be fed within five days of processing. And, if so, the birds could be condemned.

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[51] Q. Maybe it would be clearer if you could describe what happens when a driver reaches a farm? A. When he reaches a farm, he either drives or backs into the location where he is going to discharge his feed, which might be a single or multiple location, depending on where the farmer tells him to put it. And he is supposed to put his boots on and scrub his feet before he walks around the farmer's yard to hook up his equipment.

He connects the equipment and it's an air delivery unit

or he raises the boom if it's an auger delivery unit, and then engages the power to discharge the feed which takes, I don't know, maybe 2-1/2 or 3 minutes per ton.

And when he has discharged his feed, he disassembles his equipment that he had to set up, washes his boots in this material and get back in his truck and goes to another location, or back to the feed mill.

When he gets back to the feed mill presently he would be washing the running gear and his truck with a disinfecting [52] solution.

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[53] Q. (By Mr. Levenson) Mr. Hutchins, you have mentioned previously that there are approximately 136 farms? A. Yes.

Q. Where are they located? A. Over 2/3 of them are in the Waldo County area, all within an average of 12 to 15 miles from the feed mill.

Q. Mr. Hutchins, how many people are employed in the processing plant, approximately? A. In Poultry Processing or in the plant itself?

Q. Poultry Processing. A. Poultry Processing has got almost — over 400.

Q. Over 400? A. Yes, I don't know the exact number.

Q. As a matter of fact, Poultry Processing is unionized, isn't it? A. Yes.

Q. By that I mean, the qualified people in the processing plant are unionized? A. Yes.

Q. How many people in Bayside Enterprises? A. Roughly 80.

Q. Would it be closer maybe to 100? A. It could be.

[54] Q. Now with regard to the processing plant, does it have a manager? A. Yes.

Q. What's his name? A. Gilbert Knight.

Q. That's a name that has previously been mentioned. And what is his function? A. His function today?

Q. Yes. A. He's a production manager at the processing plant which he supervises the foremen and through the foremen, the employees that take the feathers off the birds and remove the vicera and process the birds into a saleable form.

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[58] Q. You've said that there are truck drivers on Penobscot Poultry Company, attached to it. There are drivers that deliver the grain to the farm. Are there any other truck drivers involved in Bayside. Let me put it this way — are there truck drivers attached to the hatcheries? A. The breeder hatchery, I don't believe we have a truck driver per se attached to it, no. They have a limited amount of transportation.

Q. Are there truck drivers attached to any other element? A. The broiler hatchery would have operators of two vehicles or two types of vehicles, the chick vehicle and the egg vehicle. One would be refrigerated and the other might be heated.

Q. And those designate Bayside on the side? A. Yes.

Q. Would you explain for the record the distances between these various locations? A. The processing plant is on Cross Street, which is at the east end of Belfast and offices on High Sreet, which is the other side of Belfast on the west side of Belfast, the feed plant we're discussing is in Thorndike which is probably 22 miles, more or less, to the west of here. And the hatchery is beyond this by six miles, the big hatchery. The breeder hatchery, which is Waldo, is four or five miles outside Belfast. The farms are spread all over Waldo County.

[59] Q. Turning to the people employed in Bayside Enterprises, could you give us somewhat of a breakdown as to generally who they are? Would this be of any help to you, this list? A. Yes.

Mr. DiCiero: Just a minute. What is that you just gave him?

Mr. Levenson: It's a list of the names and people at Bayside.

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[60] [A.] The company owned farm managers would include Steinort, Bailey, Brewster, Hamm, Harriman, Manning, Small and Smith. Farm employees, which would work on farms or farm crews would be Betty Hamm, Shute, Ms. Smith and Mrs. Steinort. Farm crews which move poultry, grade the poultry, clean the poultry houses, company owned poultry houses and sometimes other poultry work, vaccination work and blood testing and do some of the breeder selection work include a Mr. Riley, Hustus, Gibbs, Roberts, another Hustus, another Riley, a Tibbetts and two Tripps.

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[61] Mr. Levenson: At this time I would like to offer Respondent's Exhibit 5.

Judge Davidson: I receive Respondent's 5.

(The document above-referred to, heretofore marked Respondent's Exhibit No. 5 for identification, was received in evidence.)

Q. (By Mr. Levenson) Mr. Hutchins, in your testimony about Respondent's Exhibit 5, you mentioned that there were some employees giving blood tests. What does that mean, giving blood [62] tests to who, chickens? A. Yes. And the crew, that has to do with the farm crew. Poultry is blood tested for certain transmittable diseases and these crews would be involved in drawing the blood sample, submitting it to the testing laboratory in the Maine Department of Agricultural, which is a part of the five disease control program of the state.

Q. Do these crews go to all the farms? A. Those crews — that particular crew would go to all the breeder farms

during the year and to all the farms that were raising replacement pullets. And they might go to some of the broiler farms if we had to vaccinate.

Q. As an ordinary course of conduct of the business, do you vaccinate all poultry? A. If the condition varrants it, yes. Right now, yes.

Q. And for that reason you have your own crew that does vaccination, is that what you said? A. Yes. Well, routine vaccinations, yes. If we had to vaccinate 3-1/2 million birds in a week, we'd have to hire some outside help.

Q. Does anyone do debeaking? A. Yes.

Q. Who does that? A. One of the farm crews and the hatchery.

Q. And they debeak all of your chickens, all Bayside's? [63] A. The chickens are either debeaked at the hatchery or on the farm.

Q. And for that purpose, you have a crew that does it? A. Yes.

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Q. With regard to the delivery of the grain, you deliver you said approximately how many times a week does an average farm get a delivery of grain, of feed? A. It would vary on some on the size of the bin that the farm has or bins, the age of the bird and when they are to be processed. We like to have bin capacity so feed is delivered once a week, a full truckload.

Q. What is actually the case? [64] A. Both. Large farms obviously would have bin space enough to handle a weeks supply of feed, yet they would have binage for more than one truckload. Small farmers a week's supply might be less than a truckload.

Q. Is it a fair statement to say that every farm receives a Bayside grain truck at least twice a week? A. Probably.

Q. Is it probable that many farmers see a Bayside truck more than once a week? A. A number of them would, yes.

Q. When a driver arrives at the farm, approximately how long is he there, on an average? A. It will depend on the size of the delivery, but the delivery time probably runs between 2-1/4 to 3 minutes per ton. So if it was a 15 ton load, he might be there up to 45 minutes.

Q. How many farms does an average driver reach a day? A. Well, last month we delivered 388 loads of feed, with six or seven truckdrivers. So that means if it were six truck drivers then that means it's something like 58 loads divided by 4, about 58 loads a week, so that means he's on three or four farms a day.

Q. Is it a five or a six day week? A. It's hard to answer. It depends on the weather, the number of birds you have and whether we had a problem in the feed mill and they couldn't produce feed. We try to have it a [65] five day week.

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[66] A. Bayside operates feed trucks that have a capacity of 14 to 22 or 25 tons. One is a tractor trailer unit. Two of them are tandem axle bulk feed carrying units which have aluminum bodies. One is a large tri-axle unit. These have one function. They are a body that has a conveying device on the bottom and some kind of unloading device, either an air pump or audit, and they basically can be used alone. They could be utilized to pick up some ingredients, if it were necessary.

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[67] Q. Why? A. You might have two types of birds on a farm. If you're raising capons, you could be sending capon feed and broiler feed.

Q. Would it be important for the driver to know which goes with which? A. Yes.

Q. What would happen if he made a mistake? A. Well, if one of the feeds happened to be a drug feed, it could get into the wrong birds, for instance, if it were on a capon farm where we have capons and young birds that are broilers, he could put our medicinal feed in the broilers that were supposed to be taken off that farm tomorrow morning and they would carry drug residue.

Q. Is it the function of the driver to be present when the unloading operation takes place? A. He has to be, yes.

Q. What happens when one bin is empty if the farmer isn't there? A. The farmer would probably leave a note for him or tell him which bin to put the feed into. On the capon farm, for instance, the driver would have to get the information from the farmer on which bin each type of feed should go into.

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[68] Q. When a flock, a group of birds, comes to maturity and there is grain left over, what happens? A. Normally it's removed from the farm and taken to another farm.

Q. How is that done? A. You have a unit that come pick up the feed, like a vacuum cleaner type deal and put it into a compartment of a truck, measure it and take it to another farm.

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Q. What kind of a truck does that? A. It has a specialized accumulator and air lock to move the feed in the opposite direction as when it was delivered.

Q. Is that one of the Bayside trucks? A. Yes.

Q. Is there any scale on the farms to measure how much grain comes in? A. No.

[69] Q. How does the farmer know how much grain is coming in? A. It's weighed, the truck.

Q. And who weighs it? A. The dispatcher or the driver.

Q. The driver then is told to deliver it to a farm, is that right? A. Yes.

Q. And how does the farmer know that he is getting that? A. Bayside has two ways, or three ways, of determining when the feed should be delivered. Is this what you want?

Q. No, what I asked is, how does the farmer know that the amount that the driver is told to deliver is actually what is being delivered? A. It's a weigh ticket that goes with the load.

Q. And that is given to the farmer? A. Yes.

Q. When the weigh ticket is given to the farmer, is anything else given to him? A. (No response.)

Q. Would it refresh your recollection to say that a sample of grain? A. Yes. Each load carries a feed sample with it.

Q. Why? A. So that we have a back up sample in case we have a problem with the flock or the feed, and the farmer has a sample [70] of the delivery.

Q. So the driver hands him not only the weighing ticket but the sample of what he has given him? A. (Witness nods)

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[72] Judge Davidson : Why don't we ask him what his testimony is?

Q. (By Mr. Levenson) What is your testimony as to how Bayside knows how much feed to deliver initially to the farmer? A. When the birds are placed on the farm, that's when they [73] are a day old, the hatchery determines from a precalculated schedule that is developed through experience with Bayside managers that it should require this amount of feed of a certain type, and it is so designated, basically on that schedule.

Q. The schedule marked Respondent's Exhibit 6? A. That schedule is a condensation of a daily feed intake program.

Q. And subsequent to that time? A. This schedule here is then used in conjuncture with an automatic calculation of how much feed should be required if the farmer doesn't have enough feed he has to call in or send a message in with the driver to the dispatcher that he is going to be short.

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[79] *Cross-Examination*

XQ. (By Mr. diCiero) Mr. Hutchins, do you hold any office with Poultry Processing? A. How do you mean?

XQ. Well, you say you are general manager for Bayside. Are you perhaps vice-president of Poultry Processing? A. No. I hold no title in Poultry Processing.

XQ. But you do have authority over the plant manager? A. Yes.

XQ. Bayside Enterprises is considered to be the parent corporation, isn't it? A. I believe so.

XQ. And the corporate officers for all three — two or three, whichever you wish, corporations — that is, Bayside, Penobscot and Poultry Processing is 153 High Street? A. Bayside and Poultry Processing?

XQ. Yes. A. Yes.

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[80] XQ. There is a mill at Thorndike, correct? A. Yes.

XQ. And that mill supplies all of the feed requirements for the birds which are ultimately processed by Poultry Processing, is that not correct? A. That mill does not supply all the feed requirements of [81] Bayside.

XQ. All right. What are the additional requirements? A. We purchase feed from other locations.

XQ. About how much do you purchase from other locations? A. About 15% — 12% to 15%, as high as 20%.

XQ. And does that feed go directly to the mill? Is that feed delivered to the mill? A. No, sir.

XQ. Where is that delivered? A. It is delivered to the farms.

XQ. And are you talking about deliveries from KLF directly to your breeder farms? A. And some meat farms.

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XQ. Your feed requirements for the breeder farms, which you say are owned by Bayside? A. Yes.

XQ. Your feed requirements there are serviced by KLF, is that [82] not correct? A. Yes.

XQ. And that is delivered specifically by KLF drivers, is that not correct? A. Some of it is and some of it could be dilivered by Bayside drivers.

XQ. What would the percentage be? A. I don't know at this point.

XQ. Well, is it not a fact that KLF drivers deliver most of if not all of the feed requirements for your breeder farms? A. They deliver the biggest majority of it.

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[83] XQ. Do you buy feeds from anyone else other than KLF? A. Not in recent years, no.

XQ. So that all goes to the breeder farms? A. How recently?

XQ. Let's go back a year. A. In 1972 we bought our feeds from Ralston Purina Company.

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[84] XQ. Just a moment. I haven't finished my question. How many tons totally does Penobscot Feed mill produce a year? A. Penobscot Feeds produce a year?

XQ. The Thorndike mill. A. Oh, approximately 120,000 tons.

XQ. 120,000 tons? Were you here when Mr. Fenwick testified today? A. Yes.

XQ. He testified that in an 18 month period they purchased — I'm sorry — A. He said about 40,000 tons.

XQ. I'm sorry, he put it in pounds and we're talking tons. Excuse me. You say that 120,000 tons of feed a year is produced by the Penobscot mill — rather, the Thorndike mill? [85] A. Somewhat in the neighborhood, yes.

XQ. And how much of that is sold, then, to third parties? A. About a third.

XQ. Some of that goes to Fort Halifax, we've heard that testimony. Who else buys feed from the Thorndike mills? A. I believe only Fort Halifax.

XQ. Port Halifax buys about a third of your output? A. Yes, sir.

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[90] XQ. When did the mill in Thorndike open, when was that mill? A. 1970 and '71, I believe.

XQ. And after the building of the mill in Thorndike Bayside then began to derive all of its — well, within the grounds we talked about — its feed requirements, derive its feed requirements from the Thorndike mill, is that correct? A. At the time it started to operate, it was purchasing a bigger proportion from KLF than it is now.

XQ. It is not down to the proportions that you testified to a short time ago? [91] A. Yes.

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XQ. Now what about MidCentral Fish Company that you mentioned earlier. Where do they fit into this? A. They operated the Thorndike mill for a period of time.

XQ. Was that a corporation owned by Bayside? A. I don't know.

XQ. Was that in the corporate family? A. I believe so.

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XQ. They operated the entire mill, didn't they? A. Yes, they did.

XQ. When was this? A. Well, if I recall correctly, it was in 1972, part of '73.

XQ. This was right after it was built? A. No.

XQ. No? Who built the mill? A. Pine Safe Beef Company.

[92] XQ. For their own use or for your use? A. They built it for a lease.

XQ. To whom did they lease it to? A. Ralston Purina Company.

XQ. And then how did Poultry Processing acquire ownership? A. Poultry Processing doesn't own the mill.

XQ. Who owns it? A. Pine Safe Beef.

XQ. And Poultry Processing merely leases it? A. That's correct.

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[97] Mr. DiCiero: On the record, Counsel for the Respondent and Counsel here have, I think, resolved this.

Apparently, as I understand, we have a stipulation which will satisfy and I will offer the stipulation as I understand it.

That up until May 1, 1974, Poultry Processing, Inc. operated the mill and owned all the feed. Of this, two thirds of the feed was sold to Bayside and one third was sold to Fort Halifax. After May 1, 1974, Bayside now purchases its own ingredients and these ingredients are delivered over to Poultry Processing, Inc. for milling, and for which there is a charge, charge back on this.

Poultry Processing, Inc., then in its own name purchases the remaining portion of feeds, which is then sold off to third parties including Fort Halifax.

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[98] Mr. Levenson: Your Honor, that is a stipulation we would agree to.

Mr. DiCiero: One further thing. My understanding is the purpose for this changeover was for purely corporate accounting purposes, is that correct, Mr. Levenson?

Mr. Levenson: I would stipulate that Bayside Enterprises is on a cash basis. Poultry Processing, Inc. is on an

accrual basis. I think one of the reasons for it is that, as I said, an accounting basis and it makes more sense that way.

Judge Davidson: I take it both before and since May 1, 1974, the method of delivery has been the same, that there is no change in terms of who delivered the feed?

Mr. Levenson: That is correct.

Judge Davidson: That stipulation is received.

* * *

XQ. (By Mr. diCiero) Now you testified, Mr. Hutchins, that there are 109 grower farms — 119 farms, is that correct? A. Yes.

XQ. And I believe they are all farms with which there is a contract similar to Respondent's Exhibit No. 1, is that correct? My question is, the 119 farms, are they all contract farms, if you understand what I mean? A. Yes. Yes, they are.

* * *

[99] XQ. I think you testified earlier that there is a disease going around now, do they call it LT? A. Yes.

XQ. Is that the technical name for it? [100] A. Laryngotrachetis.

XQ. Now when there is a loss of birds, what actually has Bayside lost? A. When birds are lost?

XQ. Yes. A. Bayside loses the investment they have in the birds and the cost of sold items that have been delivered to that farm.

XQ. What would the value of a bird be? A. At what age?

XQ. You say 7½ to 9 weeks for a broiler. Let's say a disease develops in the 7th week, which would be almost a full grown bird? A. If it developed in a full grown bird today?

XQ. Yes. A. Probably $1.00.

XQ. It would be about $1.00. Now, what would be the normal weight for a so-called full grown bird? A. At eight weeks or so?

XQ. Yes. Well, we're talking about the same bird. A. About 3.8 to 4.4 pounds.

XQ. Between 3 to 4 pounds, right?

Now if the bird died in the seventh week, you say the company had about a dollar invested in it. What does a farmer make on a bird, full grown bird? A. It would vary on his production — average on a broiler [101] about 2-3/4¢ to 2-8/10¢ per pound.

XQ. So that is around 10¢ per bird? A. That is correct.

XQ. How many birds does— A. Well, that's not really correct because you're spreading it over the whole flock base.

XQ. Isn't that how you derive the $1.00 figure? A. Yes.

XQ. So if we are incorrect, if we are in error, we are in error on both sides? A. The grower would get a portion of the payment in most instances, even if that bird dies.

Q. What portion? A. Well, it's in the contract. It would be paid at the ratio of 1-22/100¢ and a little bit more per square foot for period of occupancy, plus he could be paid a bonus on a poundage.

XQ. All right, so if a full grown bird does—I know we're only talking about one bird—if a bird dies, the farmer loses some money, doesn't he? A. Only in relationship to what the average loss is in the growing operation.

XQ. I thought we were talking about disease and an abnormal situation that would take 1,000 birds at a time. That's an abnormal situation, wouldn't you call it, or is 1,000 birds a [102] small amount. I don't know. A. It depends on how big the flock is. If it's 50,000 birds, that's 2%.

XQ. All right. So let's take 1,000 birds out of a 50,000 flock. The farmer has a substantial investment in those 1,000 birds, doesn't he? A. At maturity.

XQ. Yes at maturity, yes. That's exactly what we're talking about, isn't it. So if a bird dies before he can

bring it to market or before it's transported down here to the processing plant, then he's lost a substantial amount of money, hasn't he? A. He would lose a minor portion of the investment, yes.

XQ. What do you mean a minor portion? A. Well, at the ratio of about 2-1/2 cents to about 30 cents or 25 cents, he has about 10%.

XQ. He's lost 10%, is that what you're saying? A. He has about 10% of the investment in the birds.

XQ. Well, if he loses 1,000 birds. If you place 50,000 birds with that farmer, isn't that how you figure it, place so many birds with a farmer? A. Yes.

XQ. And then at the end of 7-1/2 to 9 weeks you go by and you collect them and you count how many birds—you clean out a flock at a time, don't you? [103] A. Yes.

XQ. You don't take half a flock today and leave the rest for another two weeks or something, you clean out a flock at a time? A. Normally, yes.

XQ. So you count up how many chickens he's got left at the end of 7-1/2 to 9 weeks, whatever it is, and that's what he's paid on, isn't it? A. No. He's paid on the square footage that he has plus a bonus on the pounds of poultry he has produced.

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XQ. So if he's lost 1,000 birds that would decrease the total poundage, wouldn't it? [104] A. It depends on what his relationship of loss is to the rest of the growers.

XQ. Is that figured out each time? A. Yes, sir.

XQ. That's how you figure your bonuses? A. His payment would be in relationship to his production costs with the rest of the growers.

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[110] Judge Davidson: Let me ask you this, Mr. Hutchins. One thing that may be clear to Mr. diCiero but isn't clear to me. You have indicated that in computing the

bonus currently for farmers raising flocks that have been affected by the LT disease there is an alternative method of computing the bonus based upon the performance of the previous three flocks. Is that correct?

The Witness: That's the method we use, yes.

Judge Davidson: Is that a method that is provided by your agreement or is that something that you have agreed upon apart from the written contract with the farmers as a method of settling present problems?

The Witness: This is a method that we have devised to keep the farmer from being injured in an abnormal loss situation, which this LT is, which he may not have had any control over, so that he wouldn't lose his income producing capability. On the LT situation we have basically accepted the risk here, totally.

Judge Davidson: Under your contract, however, I take it under your written agreement with the farmer under which he took the flock in the first place, you had no obligation to [111] settle this way, is that correct?

The Witness: That's correct. The contract was written so he was in a normal operating situation with normal mortalities, then his income would be influenced by his capabilities.

Judge Davidson: Isn't included in what you are telling me the inference that but for settling for the alternative means of compensating the farmer, he would have sustained a rather substantial loss.

The Witness: Yes, he would have.

Mr. DiCiero: Thank you.

XQ. (By Mr. diCiero) Who is Mr. Merle Weymouth? A. He is an employee at the feed mill.

XQ. He is what? A. He is an employee at the feed mill.

XQ. Is he just an employee? A. Yes.

XQ. Does he not have a supervisory function of some sort? A. Yes.

XQ. As a matter of fact, he's in charge of the feed mill, isn't he? A. He works under the direction of Mr. Lord.

XQ. Mr. Lord is in charge of the feed mill? A. The whole feed operation, yes.

XQ. And Mr. Merle Weymouth is under him? [112] A. Yes.

XQ. And Mr. Merle Weymouth is an employee of what corporation, sir? A. Poultry Processing.

XQ. Is it not a matter of fact, Mr. Hutchins, that these drivers, these feed drivers, you say are employed by Bayside Enterprises, is it not a fact that they never come in contact with the chickens, the birds? A. Yes.

XQ. They report to work at the feed mill, isn't that correct? A. Yes.

XQ. And they are given their assignments to make deliveries to the contract farmers. And they make these deliveries and they, as you suggested either by an auger method or a blow in method, make the deliveries to the proper location on the farm, correct? A. Yes.

XQ. And is it not correct that sometimes they also pick up feed at various locations and deliver it back to the mill at Thorndike? A. What do you mean various locations?

XQ. Well, isn't it a fact that if a driver ends up with an empty bulk truck let's say in Rockland that he might pick up a load of grain at KLF down there and haul it back to Thorndike rather than dead head. Isn't that a fact? [113] A. I wouldn't think he'd haul mixed feed from—

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XQ. Would he haul anything from Rockland? A. Occasionally he might, yes.

XQ. Back to the mill at Thorndike? A. He might, but it would be the exception.

XQ. It would be the exception. What about going down to Gloucester, Massachusetts and picking up fish meal? Haven't Bayside drivers done that? A. Yes, they have.

XQ. And hauled that back to where? A. The ingredients that were purchased in Gloucester, the fish meal, were purchased by Bayside.

Judge Davidson: Where do they bring the fish meal?

The Witness: Fish meal is a storable item and fish that was bought in Gloucester was bought by Bayside and stored, at times, or sold at times to the feed mill operation. [114] Judge Davidson: Well, physically they take it back to the feed mill?

The Witness: Well, the majority of it was probably not hauled back to the feed mill, no. It was hauled to storage and used later.

XQ. (By Mr. diCiero) As a matter of fact, sometimes they go down in a tractor-trailer arrangement, don't they and bring it back that way— A. Yes.

XQ. They then come back—the driver might come back and drop the trailer or the rig off here in Belfast at the plant? A. He would probably not drop it at the plant, no.

XQ. Or at the storage facility? A. He would drop it someplace where it could be unloaded, yes.

XQ. And eventually that would arrive at the mill, somewhere? A. Yes.

XQ. And who would take it from the storage facility to the mill? A. Most of the stuff that was hauled from the storage facility to the mill was hauled by truck.

XQ. Whose truck? A. I guess I can't answer that honestly. I assume it's hauled by Bayside drivers.

XQ. By the way, I note in your listing of employees you scratched off the name Edward Hodgeton. Is that because [115] he is no longer employed there? A. Yes.

XQ. I am referring to Respondent's Exhibit 5? A. Yes.

XQ. Tell us, what job did Ed Hodgeton have when he was working? A. His job was a spare driver to haul ingredients like fish meal from storage.

XQ. Is that all he had to do? A. And he hauled some poultry meal.

XQ. What is poultry meal? A. It's a visceral by-product.

XQ. Is that what they call PBM? A. Yes.

XQ. Is that not the end residue of the viscerating process of the chickens? A. Yes.

XQ. And that's collected at the processing plant in Belfast? A. Yes.

XQ. And then is transported to the feed mill, is that not correct? A. Yes.

XQ. And that's done by Bayside drivers? A. It's done by various drivers.

XQ. Well, all feed mill drivers, if you will? A. No.

[116] XQ. Who else besides Hodgeton did it? A. Hodgeton has done it for a time and Poultry Processing people have done it.

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[124] *Redirect Examination*

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[125] Q. You mentioned the fact that if you were a farmer, you would want to be there when the delivery occurs, whether it's night or day because it influences his payment. A. Yes.

Q. Would you explain what you mean by that? A. Well, the bonus system is based on production cost and feed represents somewhere between 60% and 70% of the input in that. So since it represents such a big part of it, I guess I would want to check and see I got the feed I was supposed to, and if the bins were full.

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[127] Q. (By Mr. Levenson) Mention has been made of KLF. Is KLF a farm cooperative? A. Yes. It's a farmer owned cooperative.

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[128] *Recross-Examination*

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[132] XQ. (By Mr. diCiero) Is that correct? Has Mr. Hodge, an independent contractor, has he not made some delivery of feed to contract growers for Bayside since December, 1973? A. Yes, he and other people would make deliveries when we have an equipment problem, since we only have three trucks.

XQ. You hire these on a need basis? A. When we have a breakdown we would utilize them. We have an option. We might utilize someone else, which we have.

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Examination

Q. (By Judge Davidson) . . .

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[133] Q. Now do you know what percentage of the chickens grown by Bayside went to Poultry Processing for processing? A. The exact percentage, no, but the majority.

Q. When you say majority, it is somewhere slightly in excess of 50% or— A. Slightly less than 100%.

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[135] Q. When discussing the drivers, you said they were responsible [136] for the sanitation of the truck and the sanitation practices on the farm. Would you tell me what you meant by that? A. Well, they could be the vehicles of transmission of communicable disease for poultry from the fact that they could track it on their feet or on their clothing and equipment. They are under directives to clean this equipment on the farms to try to eliminate as much chance of it as possible.

Q. Clean which equipment? A. Well, I'm not sure whether they scrub their feed pipe or not. And when they

are back at the plant, they are responsible for washing the running gear on the truck so there is less chance of transfer.

Q. By sanitation on the farms you mean— A. Only in relation to the feed delivery.

Q. Only in relation to their own equipment? A. Yes.

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[139] *Further Recross Examination*

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[140] XQ. He reports to you as well. Do you have supervisory management responsibility over the operations of Bayside Enterprises and the two aspects of the Poultry Processing Incorprated business, is that correct? A. Yes.

XQ. And you, in turn, report to— A. Mr. George Lewiston.

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[141] JOHN E. PHILIPS

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Levenson) Your name is— A. John E. Philips.

Q. And what is your position? A. Controller.

Q. You are controller for both Bayside Enterprises and Poultry Processing, Inc., is that right? A. Yes.

Q. Now, Bayside Enterprises—the testimony has been that Bayside Enterprises sells the chickens or the poultry to Poultry Processing, Inc. at the farms, is that correct? A. Yes.

Q. Now how do you handle that transaction? A. The flock records which report the cost of the items that go

into the flock, such as the contract payment and the feed [142] and the fule is accumulated on a flock sheet. These flock sheets are accumulated for the month and totalled, and this total plus a figure for administrative expenses, and a margin percentage is added to this cost, which then becomes, so to speak, the invoice wherein Bayside Enterprises invoices the poultry to Poultry Processing.

Q. Now Poultry Processing mills the grain, your testimony is Poultry Processing mills the grain that belongs to Bayside, is that correct, as of May 1? A. Yes. Poultry Processing mills the grain for—well, it does all of the grain milling.

Q. Now, how do you handle that transaction between Poultry Processing and Bayside? A. The milling of the grain is handled on the basis of a fixed cost per ton charge.

Q. So that you make a charge against Bayside? A. Correct.

Q. Now are there any other items like this with regard to charge off against Bayside or Poultry Processing? A. In each company we have certain warehouse or supply areas which have certain supply commodities and in some cases the use of which would be common to both companies. Now, for instance, there could be disinfectant at our warehouse purchased by Bayside Enterprises in the warehouse by them, and mainly used by them. In certain cases the processing plant or [143] Poultry Processing would need some of this, in which particular case we would invoice them so much of this. We have fuels, gasoline and diesel fuel. In some cases, some of these tank inventories are purchased by and owned by Poultry Processing. If these were used by Bayside vehicles, then this becomes part of our fuel allocation wherein this is charged over.

Correspondingly, it is possible that some of Poultry Processing's vehicles could be drawing fuel from Bayside's pump, in which case there would be an allocation over.

Q. Now is there a charge against Poultry Processing or Bayside for Mr. Hutchins's services? A. The allocation of the administrative people, so to speak, is done by the public accountant at year end. We go over the general standard of what the office has done for the year and whether it is consistent with previous years and so forth. He interprets what shall be the allocation, if any, and I don't know—I don't see it beyond that so I don't know.

Q. Am I correct in saying that the basis of what you have testified there is a conscious attempt by you to separate the expenses of the one against the other? A. Yes.

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[145] *Cross-Examination*

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[147] XQ. Now in any of these transactions involving the transfer or the sale of chickens to Poultry Processing, does any money actually change hands? A. Yes.

XQ. How is that handled? A. By writing checks.

XQ. By writing checks for the transfer of funds from one checking account to the other? A. Well, you call it transferring. In a sense, to me it's two corporations. You have two cash receipts books, two cash disbursement books. Through disbursements here you're writing the check to, let's say if this was Poultry Processing, you're writing a check to Bayside Enterprises Corp. Correspondingly, the clerk handling cash receipts at Bayside Enterprise would handle it like any normal check.

XQ. Are they both signed by the same person? Who signs the Poultry Processing check? A. Who signs them? The check signers are myself, Clayton Downer, Herbert Hutchins, Bernard Lewis, George Lewis and David Lewis.

XQ. Who are the check signers for Bayside Enterprises? A. They are the same people.

XQ. And all of these corporations, I believe you testied, are under the control of the Lewis', is that correct? I can go down through all of them: Bayside, Poultry Processing, [148] and so forth? A. Yes.

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XQ. Are you aware of a checking account open in the name of Penobscot Poultry Company? A. Penobscot Poultry Company is a trading name for Poultry Processing, Inc. Poultry Processing, Inc. trades as Penobscot Poultry Company.

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[151] *Redirect Examination*

Q. (By Mr. Levenson) Mr. Philips, you have testified about various corporations and, as I understand it, Cummings Brothers is a feed wholesaler, is that right? A. To my knowledge.

Q. Cummings Cold Storage and Riverside Freezer are freezer companies? A. To my knowledge.

Q. What else was there? A. Coastal Fisheries.

Q. What are they? A. To me they are a fish processing plant.

Q. All of those companies have the Lewis's as president and treasurer?

Judge Davidson: Well, I'm not clear, and I'm not even sure if it's necessary, but did you indicate they were separate corporations or that they were operating divisions of Poultry Processing?

Mr. Levenson: I stand correct. He did say that, and instead of using the word "corporations", I should have used the word "divisions."

[152] Judge Davidson: Is that what they are?

The Witness: These are divisions of Poultry Processing, Inc.

Q. (By Mr. Levenson) So they do all of these different things that you have specified? A. Yes.

Q. And they all have Bernie Lewis as president and David Lewis as treasurer? A. To my knowledge, yes.

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[153] ROBERT DESROSIERS

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

[154] *Direct Examination*

Q. (By Mr. Levenson) Mr. Desrosiers, would you tell us your full name, address, and what the nature of your job is? A. My name is Robert J. Desrosiers. I live in Hope, Maine. I am employed by Bayside Enterprises as a broiler department manager.

Q. Would you tell us what that job entails? A. It involves being in charge of growing poultry. From the standpoint of growing I mean poultry grown for the prime purpose of meat production. It involves the health of that poultry, and the scheduling of feed programs and so forth.

Q. In the course of your job performance, do you have occasion to communicate with the farmers, the contract farmers? A. For the most part yes, that's correct.

Q. And what is the manner of your communication? A. I function as the manager of what has been referred to as the service men or field supervisors. As the manager of that department, which is referred to as service department, I am in close relationship with the growers, and the scheduling of poultry onto those farms. I initiate the scheduling of feed programs onto those farms. I am in charge of the poultry health on those farms.

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[156] Q. I'm sorry to belabor this point, but would you tell us what type of requirements you require with regard to feed distribution, as far as sanitation goes with your drivers? A. I'd have to go back to the intent of the letter to begin with. First of all, we make an attempt to enlighten our growers as to the problems in regard to the spread of disease. The first paragraph would indicate how many breaks we've had, in what areas.

And then it goes on to outline what areas of sanitation procedure that we, as a company, have set out for our own people, which includes feed delivery truck drivers who carry out strict sanitation methods. "The truck under carriages will be sprayed between loads," in that very first letter.

Hopefully, if this isn't being done, it would be reported back to me from a grower who would or might observe it. And we would make sure the correct procedure is taken care of and it's done on the next trip.

Q. You ask the grower to report to you any violations in sanitation practices? A. Yes, in essence. In fact, I'm not sure but one of these letters—in one letter I did write and asked them to report to [157] me if these practices were not being carried out.

Q. Now mention was made in previous testimony about a sample of grain that gets distributed to the farmer with each delivery. Would you tell us what the exact function is with regard to sanitation, if it has any? A. Well, not in the area of sanitation. It would more likely be in the area of contamination. Should there be a contaminant in the feed, we would have that sample to fall back on in order to pinpoint the day in which the ingredient might have gotten into that particular day's feed.

In other words, we can go back and trace if we have a sample. There is also a follow up sample in the feed mill.

From the standpoint of sanitation, I would think it would function more in the area of contamination.

Q. Now with regard to the grain itself, much discussion has been made on the approximate ingredients of this certain amount of grain.

Q. Do you regard the grain itself as an agriculture product? A. Absolutely. It's a source of protein.

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[159] Q. Does the driver have any obligation to prevent any of the moldiness or wetness or mixing that you just spoke about? A. Yes. He has a lot of responsibility other than that of a driver. He gets onto the farm, for instance, and let's say it's snowing real hard or raining. When he goes up on the top to open the shute, to be certain the bins are empty, he will only open one at a time, as opposed to all of them on a good day.

Disease control, with regard to LT, for instance, might be another area. He wants to put his truck in a specific area, knowing full well that he can suck with his cyclone at the base of the truck, can actually suck the virus, should it be there, out of the buildings from the fan operations up through the truck and contaminate another farm from the interior of the truck.

They are guided in this area by the dispatcher and the mill supervisor.

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[160] Q. Why doesn't Bayside use Hodges on a regular basis rather than its own truck driver?

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A. Yes. With our own people delivering feed on our farms, we have control in regard to sanitation, where those vehicles have been prior to the delivery of feed they are now making. [161] Whereas, with Hodges, Dick Hodges I believe his name is, we do not have that control. We don't know where that vehicle has been prior to delivering one

of our loads and we feel in the area of sanitation control, disease control, rather, we just can't chance that situation.

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[162] Q. (By Mr. Levenson) How much of the time of the drivers is spent on the farm and how much on the road? A. I would have to estimate probably 50% based on the average mileage to and from our farms.

Q. You say 50% on the farms, 50% on the road, is that your testimony? A. Yes, I would estimate that.

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[164] *Cross-Examination*

XQ. (By Mr. diCiero) Mr. Desrosiers, it is your duty, then, you have direct contact with the contract farmers, isn't that right? A. Yes, sir.

XQ. Is it up to you to get new contract farmers as needed and evaluate the ones you have, and that sort of thing? A. Yes, sir.

XQ. Do you have anything to do with the hiring or the firing or the directing of the feed drivers? A. Not directly.

XQ. You don't give them any orders? You don't tell them where to deliver things? A. I do not.

XQ. I think your testimony was on Respondent's 6 and 7 that you give some general instructions on making sure that certain disease control measures are taken care of? [165] A. This would be through the supervision at the feed mill.

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[166] XQ. These feed drivers—strike that. Hodges, when he is being used as you explained why he is not—when he is being used, essentially does the same thing as the feed mill drivers do, doesn't he? A. Yes.

XQ. And that'll all he does, he delivers the feed grain? A. Yes.

XQ. And you say that the drivers spend about, you esti-

mate [167] that they spend about 50% of their time on the farm and 50% of the time on the road? A. That's correct.

XQ. Now somewhere in there they have to spend some time in the mill, don't they? A. Yes.

XQ. So the percentages probably would have to be cut down on both ends, wouldn't it? A. Probably.

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[168] *Redirect Examination*

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A. The driver has in each vehicle a foot pan that's like a 12 quart pail. He has a bottle of a base disinfectant. He has [169] a water bucket and a sprayer, which he uses in the function of his sanitation procedures.

Q. And that's in each truck? A. In each vehicle.

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[174] WILLIAM PLAMONDON

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Levenson) Would you please give your full name, address and your position? A. William Albert Plamondon, City Point, Belfast. And I am a dispatcher for Penobscot.

Q. Mr. Plamondon, is it a fair statement—how many feed drivers are there? A. There are six.

Q. And there are two shifts? A. Right.

Q. When do the shifts begin and end? A. Three to one and from one to usually nine or when the feed is finished delivering.

Q. You have to tell me, morning or afternoon? A. Three in the morning to one that afternoon. Then from one to nine o'clock that night.

Q. Does each driver regularly haul to the same farm? [175] A. No.

Q. What is the practice? A. If a driver comes in and if the farmer isn't out of feed or something, I give him this list and they go to that farm. They don't go to the same one all the time.

Q. Who is Mr. Weymouth? A. He is in the mill, supervisor.

Q. And what is his principal function? A. He is in charge of making sure that the feed is made.

Q. What is your principal function? A. I take care of the farms and make sure that the feed is delivered to the farms.

Q. In the course of your duties, do you ever have contact with Mr. Desrosiers? A. Right. He tells me if there is any change in the schedule or something comes up, he tells me. Like the servicemen, they tell me what to do, like medication or something like that. I am in touch with him most of the time.

Q. How many times a day do you get in touch? A. Exact amount I don't know, but at least 10 times, sometimes, or vice versa.

Q. Could you explain a little bit what the telephone conversations are about so we understand? A. If they don't pull a flock the night they're supposed to, he'll tell me that. They need a little bit more — and he [176] usually tells me the amount, how many he's going to pull on one floor, or vice versa. He'll tell me "deliver a ton" or something like that, whatever it is.

Q. When you say deliver, you are talking about feed? A. Right.

Q. Do you have contact with the hatchery? A. Right. The hatchery, they make what we call a placement sheet. It gives me a week's advance of what chicks are going in the following week. And I line it up, when they're supposed to get their feed, and then I take care of the schedule from there on what type of feed to deliver to them. And, like I says, if something happens I call the farmer and ask if he's ready or something like that.

Q. Do you tell the truck drivers which farms to go to? A. Right. Usually the slip does. We have slips and the name of the farmer is right on there, and they'll go to that farm.

Q. Do you make up the slips? A. Right.

Q. Besides the contact with the hatchery, do you have any contact with field supervisors? A. You mean servicemen?

Q. Right. A. If a flock is sick or something, they'll usually call me and tell me what kind of medication to put in. Or if there's [177] trouble or something, or mainly sick birds or something like that, he'll tell me what kind of feed to put in.

Q. Mr. Plamondon, were you a former truck driver yourself for Bayside? A. Right.

Q. Who loads the trucks, Mr. Plamondon? A. If I have the time, I load them, or the drivers will load them. And most of the drivers know where the bins are. On top of the slips I put the bin number. We get them in letters; A and B is a certain type of feed and so on.

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Q. Mr. Plamondon, do you have any function with regard to feed samples on the farms? I understand that there is a feed sample picked up by the truck driver? A. Right. Every day I take these samples on every type of feed that goes out of the mill. And the driver, of course, has a sample

for the farmer. And if there is something wrong with the feed or something happens, we have a sample to go back to.

Usually if something happens it takes a little while, so I have shelves downstairs where I have the samples saved for a [178] certain length of time with a date on it on when it was pulled out of that mill.

Mr. Levenson: I have nothing further.

Cross-Examination

XQ. (By Mr. diCiero) Mr. Plamondon, who is your supervisor? A. Herb.

XQ. Herb who? A. Herb Hutchins.

XQ. Herb Hutchins is your supervisor? A. Right.

QX. Is Herb Hutchins at the mill every day? A. No, not every day.

XQ. Who is your supervisor day-to-day? A. Day-to-day Merle Weymouth.

XQ. Merle Weymouth tells you what to do? A. No. Well, if something comes up like he wants to change or something, like on a truck or something, he does. But day to day work, I take care of it.

XQ. When the truck drivers—when I'm talking about truck drivers, you know who I'm talking about? A. Bayside.

XQ. The feed mill drivers? A. Right.

XQ. When they want some time off or they're not going to be in for some reason or other, looking for a vacation or something, [179] they check with Merle Weymouth, don't they? A. No. They check with me, sir.

XQ. And then you check with Merle Weymouth? A. No. Usually, on vacation or something, we have a chart and then I get their pay lined up and all, and I make the arrangements to take someone's place when they're on vacation.

XQ. Who do you make the arrangements with? A. With the drivers, with the other drivers or something like that. We run two shifts. Now an afternoon shift has a week off or vacation, usually that driver I ask them to come in at 7. Or sometimes he will run a long shift. It all depends on how much feed is going out that day.

XQ. So you have to check with Merle Weymouth first, don't you? A. No.

XQ. You don't check with Merle Weymouth? A. No.

XQ. You don't bother to find out how much, what orders or anything like that? A. You see, the way it's set up is I have a book and I have the farms, and I have a small filing cabinet. And we are on an automatic system, so I know exactly when that farmer should run out of feed. So I put him down on the following week, and I keep a record. That's the way I keep my records and I know what type of feed that farmer should get. And that's the way it's run.

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[182] XQ. Is it more usual that the driver loads the truck than you? A. If I'm busy, they usually load it, but if I have time like if we have to empty a bin or something, I help them, [183] because usually we like to get them out. What I do is I clean them out.

XQ. In other words, you bang on the sides to make sure the feed falls down? A. Right.

XQ. But most of the time, doesn't the driver himself go out and load the trucks? A. Like I said, right, sir.

XQ. Isn't that a fact, that's a majority of times, isn't it? A. It all depends. I can't say a majority of the time because I go out as much as I can. But, like I say, if I'm busy or if I'm figuring something and a truck comes in, I give the driver the slip and, like I says, the bins are marked and they load the truck.

• • •

[185] A. One time we used to deliver our own farms, breeder. But we don't do that because KLF takes care of it now.

XQ. KLF takes care of the breeder farms now? A. Right. But, like I says, those are our own farms. We used to do it at one time. I don't know how long ago. It was quite awhile ago.

XQ. Insofar as the hatchery, the only contact that you have with the hatchery is for them to let you know how many chicks are going to be placed on farms, isn't that right? A. Right. Unless there is a change, they'll notify me they're going to take something off and put something else in its place, or something like that. But they give me, like I says, a weeks advance on what birds are going to be placed that week.

XQ. So you will know when to start deliveries to the contract farm? A. Right.

XQ. These drivers don't make any deliveries to the Hatcheries? A. No.

XQ. There's no feeding at the hatchery at all, is there? A. As soon as the bird is born, out it goes, and the feed is waiting for it at the farm.

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[186] *Redirect Examination*

Q. (By Mr. Levenson) Mr. Plamondon, do you have an individual office at the mill? A. Right.

Q. And does Mr. Weymouth have one? A. Yes, he does.

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[188] ROBERT DESROSIERS

was recalled as a witness by Judge Davidson on behalf of the Labor Board and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Judge Davidson) I would like to show you what has been marked as Respondent's Exhibit 7 and ask you to look specifically at Paragraph C, with the letter C in front of it. Please read it to yourself.

Would you tell me now what that refers to? A. O.K. It refers to pick up crews that are part of the poultry processing group. In other words, when we have to pick up poultry to get it into the plant —

Q. That's the finished bird? A. That's the finished bird, ready for marketing. And what this refers to is the fact that these people are using the same precautions that have been discussed in regard to the truck drivers, scrubbing of the boots and they are wearing laundered coveralls. In other words, these coveralls are [189] laundered every day and the boots, for that matter, are laundered every day. They go right through a washer and a dryer system, rather than take the chance of them contaminating a farm from something we didn't know about the day before. These people are into coveralls and boots to eliminate chances of contamination.

Q. Do they also wash down their trucks and take precautions of that kind? A. In the case of the routine farm where there is no known Laryngotrachetis, that truck is sprayed every day before it leaves the plant, and it goes to dispatch unit and from the dispatch unit it goes to the farm without first being sprayed. However, in the case of a known place, the truck is broken down and washed, every coop is washed individually and they actually pinpoint the crews.

In other words, we've got people that separate flocks. That crew never goes near an LT flock. We call it Lt — it's easier than Laryngotrachetis.

Q. Where do those crews work, at the plant, or are they out at the farm? A. They generate out of the plant. They are called pick up crews.

Q. And they go from the plant to the farm? A. That's correct, but they don't work in the plant. They merely pick up poultry.

[190] Q. Are they Poultry Processing? A. I believe they are Poultry Processing.

Q. The procedure described in Paragraph C, is that a retained procedure that goes on all the time, or is it a special procedure? A. As you know, the letter was written in regard to the control of Laryngotrachetis. This was not a routine procedure. A portion of this, the washing of the boots, and using the foot pans is normal and routine. However, this is extraordinary circumstances.

• • •

Mr. DiCiero: The stipulation that I offer is that the [191] roaster and broiler pick up crews described in Respondent's 7, paragraph C therein, are employees in the bargaining unit represented jointly by the Teamster Local 340 and the Amalgamated Butcher's Union Local 385.

Mr. Levenson: I would be agreeable to that if part of the stipulation is that you also agreed Mr. Desrosiers has a farm group and is therefore concerned with the health of the farm group and with running the farms.

Mr. DiCiero: Why do I have to stipulate to that? He has already testified to that?

Judge Davidson: I think that is clear from the exhibit itself.

Mr. Levenson: All right, to that extent it is clear.

Mr. DiCiero: You will stipulate that these pick up crews that we talked about in paragraph C are represented jointly in that bargaining unit?

• • •

CLARENCE MCKENNY

was called as a witness by and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as [192] follows:

Direct Examination

Q. (By Mr. diCiero) Mr. McKenny, would you state your full name and address? A. Clarence William McKenny, R.F.D. 2, Thorndike, Maine.

Q. Mr. McKenny, were you formerly employed at the Thorndike mill at Penobscot feeds? A. Yes, I was.

Q. When did you stop working there? A. It was just a few days before Christmas. It was in December of '73.

Q. When did you start working at that location — you know what I'm talking about, the Thorndike Mill? A. I worked there about a year and a half, somewhere around May of '72.

Q. And who was your employer at that time? A. My employer?

Q. Yes, who was signing your checks? A. At that time it was Mid Central Fish.

Q. Now what were you doing there at that time? A. I was unloading cars out back, grain cars.

Q. Grain cars? A. Ingredients like gluten, fish meal, stuff like that.

Q. Now did there come a time while you were so employed that you had a conversation with Mr. Merle Weymouth about continued [193] employment? A. Right.

Q. Now about when did this take place? A. It was around July or August.

Q. Of '72?

• • •

[198] Q. (By Mr. diCiero) When you became a driver, a feed mill driver, did you speak to anyone else other than Mr. Merle Weymouth about this job? A. No, I didn't.

• • •

Q. What were you duties as a feed mill driver? A. When I first started, I was on the night shift and we would go in at one o'clock —

Q. That's one o'clock in the afternoon? A. Right. And we might work until eight o'clock, or we might [199] work until one o'clock in the morning. You never could tell. It would all depend on how much grain was left to haul.

And we'd go in, get the trucks, sometimes it was loaded before we got there, sometimes we'd have to load it. If we had to load it, we would drive underneath the scales and they have what they call a portable scale, it moves right back and forth under these bins. And Bill Plamondon would give us the slip, and we'd go out, put so much, like the bin would hold three ton, and we had five compartments on the truck. We'd put three ton in each one.

And after we got the scale filled out, we got a slip of paper. You'd run in there and you'd stamp it. It would stamp the weight down, then you'd put it in the truck. And after the truck was full, you'd go to the farm that was on the slip.

Q. That description that you have given us, is that a typical day? A. Right.

Q. What you would do in the mill? A. Right.

Q. How often did you load the truck and — strike that. Did anyone else ever load the truck for you? A. Yes, William Plamondon did.

Q. Can you tell us how often you loaded it and how often he loaded it? A. Well, I would say we would load it probably two thirds of [200] the time.

Q. Who did? A. Us drivers.

• • •

Q. What would you do when you got to the farm? A. When you get to the farm, you knew where to go. If he had pipes hanging down the side of his building, that's where you had to blow the feed off. And most generally he had a little jar with a cover nailed on the wall. It had a slip on there telling how much he wanted there and how much he wanted there.

Q. You mean in which bin he wanted you to deliver it? A. Right. If he didn't have a slip there and he wasn't around, you put it in the bins to your own discretion.

Q. How long would it take you to deliver a load on a farm?

Judge Davidson: What do you mean by deliver? Does that include loading?

Q. (By Mr. diCiero) When I say deliver, I mean once you're on the farm — [201] A. Unloading time?

Q. Yes. A. It could be anywhere from half an hour to an hour.

• • •

Q. When you did see him, did the farmer tell you how to unload the grain, the feed, rather? A. No, he didn't tell us how to. He asked if we'd put so much feed here or so much feed there, but he never told us how to do it.

• • •

[202] Q. (By Mr. diCiero) Tell us, have you ever made any haulings with the trucks? A. Yes, I have.

Q. Tell us when, where and what? A. If I were going to Rockland, Thomaston, or anywhere in the locality, every so often they'd send me to K&L farms, Knox Lincoln farmers co-op to pick up a load of capon feed or breeder farm feed and bring it back and deliver it.

Q. To whom? A. Bayside's breeder farms or capon farms.

Q. The contract farms? A. Yes.

Q. Did you ever deliver any of this back to the mill, to the Thorndike mill? A. Yes, I've hauled ingredients back to the mill before.

Q. From KLF? A. I've hauled some from KLF and I've hauled some from DeCosta out in Camden, Maine, in Turner, Maine.

Q. What was that you hauled of DeCosta? A. DeCosta, I think it was either corn meal or it was alfalfa, and I'm pretty sure it was alfalfa.

[203] Q. Let's go back just a bit. How often did you haul feed from KLF to the breeder farms, to the capon contract farms? A. You might get a load maybe once a month, maybe twice a month.

Q. Is that usual for you, about once or twice a month? A. You could figure once a month.

Q. And this is from July of '72 when you started as a driver until December of '73? A. Yes.

Q. And how often did you make the deliveries? Did you haul from the KLF farms — KLF location in Rockland to the Thorndike mill? A. I think I did that once, maybe twice, but I think it was once.

Q. Now what about the alfalfa that you hauled from Turner, Maine from the deCosta? A. I did that just once.

Q. You did that once? A. Right.

Q. And how about — where did you haul that? A. To Thorndike.

Q. Was that a full load? A. As I recall, I think it was 15 tons.

Q. That's a full load, isn't it? A. Right.

[204] Q. That's five bins, three tons per bin? A. Right.

Q. Was that the same thing when you hauled from the KLF? A. Sometimes you might get a whole load, other times you might get a half load.

Q. Have you ever done any other hauling? A. Yes, like during the summer, this would be the last summer.

Q. 1973? A. I would leave the mill, go up to Belfast, pick up a tractor and trailer and go to Gloucester, Massachusetts for a load of fish meal. And that would be on a Friday night and we returned back on a Saturday before noon and drop off the trailer and the tractor and then go home.

Q. You'd drop it off at the storage area? A. Either the storage area or at the mill.

Q. Now the tractor-trailer that you drove, whose tractor-trailer was that? A. It belonged to Bayside.

Q. And what name was on the side? A. I think it was Bayside.

Q. Would you tell us where in Gloucester you went? A. Gloucester, Mass.

Q. Do you know the name of the company? A. Lippman Fish Meal, I think it was.

[205] Q. Lippman Marine Products? A. Yes, something like that.

Q. How often did you do that? A. I made probably six or seven trips down around the summer.

Q. During the period of 1973, the summer of '73? A. Right.

Q. That was a whole tractor-trailer load, was that a 40 foot trailer? A. Right, 20 tons.

Q. How were you assigned those trips? A. Massachusetts. Merle Weymouth asked us if we'd like to go for the extra time, and we'd say "sure". We needed the extra time.

• • •

[207] LARRY MCAULEY

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

Direct Examination

[208] Q. (By Mr. diCiero) Mr. McAuley, would you state your full name and address for the record? A. Larry McAuley, Fall River Avenue, Belfast, Maine.

Q. And by whom are you employed, Mr. McAuley? A. Bayside Enterprises.

Q. And what do you do for Bayside? A. Truck driver.

Q. Where are you employed? A. Thorndike.

Q. At the Thorndike mill? A. Right.

• • •

[219] Q. Have you ever done any kind of work at all as an employee of Bayside on any of the farms? A. No.

Q. Did you ever catch any chickens? [220] A. No.

Q. Have you ever done any work in the plant, in the mill while you were an employee of Bayside? A. If we finished early one night, we might go down and clean a load up there.

• • •

[223] Judge Davidson: You described your duties. I wonder if you could tell me about how much time — well, first, strike that. About how many farms do you make deliveries to in the course of a day?

The Witness: Three or four, sometimes more.

Judge Davidson: How many hours would you work a day in which you visited three or four farms?

The Witness: An average day probably around nine hours, sometimes more.

Judge Davidson: Could you tell me how that nine hours breaks down in terms of where you are? How much of the day, in other words, are you at the mill, how much are you on the road, how much are you at the farms?

The Witness: I'd be out at the farm probably anywhere from 45 to 50 minutes, maybe an hour.

Judge Davidson: Each farm?

The Witness: Yes.

Judge Davidson: So that would be perhaps somewhere between three and four hours a day on the farms?

The Witness: Yes, somewhere around there. It all depends. You might have trouble unloading or something like that, the truck.

[224] Judge Davidson: And the rest of the time how much is at the mill and how much is on the road?

The Witness: You're not at the mill too long if you don't have to wait to get loaded. If there's trucks in front of you, you have to wait awhile to get loaded, but not very often.

Judge Davidson: Do you have any motion on how many miles you drive each day?

The Witness: On the average, it's over 100 miles a day, probably 120, sometimes more and sometimes a little bit less.

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[225] CLARENCE MCKENNY

was recalled to the stand by and on behalf of the Charging Party and, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Cohen) Mr. McKenny, are you working for Bayside at the present time? A. No, I'm not.

Q. When did you terminate your employment with Bayside? A. Last December.

Q. How did that come about? A. Merle Weymouth called me into his office and he said that because of the energy shortage, and they were going to let go one of the sucker trucks and the sucker truck is one they take to the farm, any feed that is left over after the birds are gone they suck back into the truck. And you take it to another farm; most generally you take it to another farm. And he

said he'd have to let me go because I was the youngest man on [226] the seniority which, at the time, I didn't think I was.

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RESPONDENTS' EXHIBIT NO. 4

BAYSIDE ENTERPRISES, INC.

BROILER • ROASTER • CAPON
FEED SCHEDULE
Eff. June 3, 1974

BROILERS:				
Starter WF-180	.666	lbs.	0 – 2 wks.	Mash
Starter Robenz + 3 N.	2.4	lbs.	2 – 5 wks.	Crumble
Broiler Ration Robenz + 3 N.	3.7	lbs.	5 – 8 wks.	Pellets
Ration ZZB-10	1.5	lbs.	8 – 9 wks.	Pellets
ROASTERS:				
Starter WF-180	.666	lbs.	0 – 2 wks.	Mash
Starter Robenz	3.4	lbs.	2 – 6 wks.	Crumble
Ration Robenz	2.7	lbs.	6 – 8 wks.	Pellets
Ration ZZB-10	1.5	lbs.	8 – 9 wks.	Pellets
Finisher Robenz	5.4	lbs.	9 – 12 wks.	Pellets
Ration ZZB-10	2.1	lbs.	12 – 13 wks.	Pellets
CAPONS (Illegible):				
Starter WF-180	.666	lbs.	0 – 2 wks.	Mash
KL S40K Amprol + 200 gm Aureo			2 – 6 wks.	Mash
Bayside Capon Zoa Mix			6 – 16 wks.	Pellets
Bayside Capon Finisher (Zoa)—3 wks. prior to mkt.				Pellets
CAPONS (Illegible):				
Starter WF-180	.666	lbs.	0 – 2 wks.	Mash
Starter Robenz + 3 N.	2.4	lbs.	2 – 5 wks.	Crumble
Bro. Ration Robenz + 3 N.	3.7	lbs.	5 – 8 wks. (to withdr.)	Pellets
Ration ZZB-10	1.5	lbs.	8 – mkt.	Pellets

RLD:bf
cc: HCH
RAK
R.L.
Dispatch – Feed Mill
Servicemen
R.E.

RESPONDENTS' EXHIBIT NO. 5

BAYSIDE ENTERPRISES, INC.

General Manager	Herbert Hutchings
Breeder Dept Mgr	Richard Koski
Broiler Dept Mgr	Robert Desrosiers
Poultry Servicemen	Clair Lewis
	Henry Chalmers
	Merle Grass
	David Kinney
Office Clerical	Barbara Flood
	Minnie Raven
	Nannette Way
	Rebecca Trafton
Hatchery Manager	Robert Eldridge
Hatchery Foremen	James Fernald
	Albert McCormick
	Alton Reynolds, Jr.
Hatchery Clerical	Patsy Berry

BAYSIDE ENTERPRISES, INC.

Farm Managers

Dietrich Steinort	Lloyd Harriman
Leslie Bailey	George Manning
Ralph Brewster	Lilford Small
Ralph Hamm	Allan Smith

Farm Employees

Betty Hamm	Lucille Smith
Arthur Shute	Karen Steinort

Farm Crews

Lewis Riley — Foreman Grading Crew
Dean Hustus — Asst. Foreman Grading Crew
Melroy Gibbs — Foreman Farm Crew
Joseph Roberts — Foreman Blood Testing

Dale Hustus	Dennis Tripp
Edward Riley	Larry Tripp
Odber Tibbetts	

Bulk Feed Delivery — Thorndike

Dispatcher

William Plamondon

Drivers

Steven Brown	Larry McAuley
Joseph Harriman	Clyde Rolerson
Leroy Harriman	Winston Thomas

Breeder Hatchery — Waldo

Manager

Leon Gallant

Employees

Norma Eynon	
Jean Glover	Deane Wood

Hatchery — Unity

Egg Processing

Albert Curtis	Charles Hartley
Charles Curtis	Dale Hartley
Erving Curtis	Joseph Hartley
James Curtis	Wilfred Letourneau
Mark Curtis	Hillard Parsons
Lena Dakin	Venlon Vanchough
Emerson Doughty	Linda Ward

Chick Processing

Eva Ames	Donna Erskine
Helen Bacon	Sally Fernald
Linda Bartels	Doris Nickless

CHICK PROCESSING (*Continued*)

Shirley Bumpus
Crystal Clark
Terry Constable
Jacqueline Day
Edith Parsons
Marilyn Pelkey
Lorene Pushor
Madeline Ward

MAINTENANCE

Dwight Furrow

DRIVERS

Egg Truck:
Blaine McCormick

Chick Truck:
Walter P. Roberts

HELPER

Henry Curtis

RESPONDENT'S EXHIBIT NO. 6

BAYSIDE ENTERPRISES, INC.
153 HIGH STREET
BELFAST, MAINE 04915

December 14, 1973

Dear Bayside Grower:

In June of 1971 I wrote to inform you of a Laryngotracheitis (LT) break on one of our farms. Again today I write to inform you of a break in a cage operation in Carmel. Although we have no business contact with this operation we will consider the situation as though it were one of our farms. By taking steps in that direction, hopefully, we can be as successful in avoiding a crisis as we were in 1971.

Those of you who have been through this type of problem understand the situation and for those of you who have not been through it we will attempt to enlighten you.

This disease is caused by a virus which cost the Maine Poultry Industry millions of dollars during the last epidemic in the mid 1960's.

There is no medication to cure the disease. Only strict sanitation programs can serve as a preventive to keep this one case from becoming an epidemic. We have taken steps at a company level to ward off the possibility of this:

A.) All crew vehicles will be washed every day.
B.) Pullet separating crew will be in sanitized uniforms just prior to arriving on your farm.
C.) Feed delivery truck drivers will carry out strict sanitation methods and truck undercarriages will be sprayed between loads.
D.) All work crews will step up their sanitation procedures.
E.) All feed will be left on farms. Estimate your last feed order carefully.

Should Bayside have a single farm break the following steps will also be initiated:

A.) All live haul trucks will be sprayed daily.
B.) All weigh stations and feed loading areas will be washed daily.
C.) Service personnel will answer emergency calls only.

These things, along with your complete cooperation, are necessary. The following is to refresh your memory in the steps that should be taken at the farm level.

A.) Complete footpan management to be carried out BY ALL PERSONNEL — INCLUDING YOU. These footpans must be changed DAILY.
B.) Absolutely No VISITORS — and certainly do not visit.
C.) Equipment lending — DO NOT borrow or lend equipment (if necessary, notify your fieldman and he will advise you).
D.) Screen all openings immediately with 1" x 1" screening. Most of you have this now — please check — you may have one missing.

E.) Get rid of all outside "poultry" including waterfowl. There is no better vector of disease.
F.) Rodent control is a must.
G.) Do not leave dead poultry in grain rooms. Incinerate immediately.
H.) Dispose of litter properly.
I.) Do not allow litter or oil delivery people in your buildings.

We are asking you to check yourself in these above areas of greatest importance. If you see any signs of respiratory condition in your flock, call immediately. Don't wait.

Thank you for your future cooperation which I am certain will keep us all in a better competitive position.

(s) ROBERT L. DESROSIERS
ROBERT L. DESROSIERS
Broiler Department Manager

RLD/mr

RESPONDENT'S EXHIBIT NO. 7

BAYSIDE ENTERPRISES, INC.
153 HIGH STREET
BELFAST, MAINE 04915

April 10, 1974

Dear Bayside Grower:

At the time of our last letter regarding Laryngotracheitis, there had been six flocks that had come down with the disease. We then went through a period of about 20 days without a break, and then "the roof came in".

We now have had twenty-five flocks break with the disease in Maine as of this date, of which nine have been in the last twelve days — a sign that our sanitation programs and safeguards have dwindled to some extent at the farm as well as inter-company and intra-company.

LET'S REVIEW BOTH SANITATION PROGRAMS:

A. Our Pullet crew is using coveralls and boots.
B. They are sanitizing their suburban and equipment every day.
C. The Roaster and Broiler pickup crews are washing their boots, and wearing laundered coveralls prior to entering your buildings.
D. Their equipment is also being washed each day.
E. Bayside Fieldmen are limiting their in-building calls to emergencies, or respiratory situations, etc.
F. Feed truck drivers are washing their boots upon entering and leaving your farm.
G. Before re-entering the feed mill the wheels of trucks are being sprayed with disinfectant.
H. A special program has been set up to handle known L.T. farms.

Should you know of any of the above programs not being adhered to, I would appreciate knowing about it.

Let me review the areas which you as a GROWER should be responsible for in order to control L.T.

A. *Footpans* — A MUST — changed daily, used by all individuals — (there should be a brush by the pan). To dip the soles of your shoes is not adequate; boots that allow you to step into the footpan and to brush off any mud or adhering material, is what is necessary. A clump of material on the sole or heel of your boot CANNOT BE SANITIZED.

B. *Traffic in your buildings* — should be limited to the caretaker. Under no circumstances should you allow a repairman in your buildings without his being dressed in clean coveralls and boots.

C. *Loaning equipment* — should be taboo. If it *is* necessary, be certain it is washed and disinfected properly.

D. Do not visit other poultry buildings.

We realize that going over these points may become a drag to the individuals who do, in fact, carry on a thorough sanitation program. However, for those people who are lax in any of the above mentioned areas, please take heed.

It has long been thought that Laryngotracheitis is airborne. However, in recent years that has been considered Hog Wash, and we consider that to be a fact. It must be carried on shoes, boots, clothing, equipment, trucks, and the like, an.d is airborne only to the point of moving with dust.

If we all carry on our business considering these methods of transmission, we can beat this thing.

I suggest we keep at it.

(s) ROBERT L. DESROSIERS
ROBERT L. DESROSIERS
Broiler Department Manager

RLD:bf

[The Administrative Law Judge's Decision is omitted from this Appendix as it is printed on pages A-9 through A-22 of the Petition for Writ of Certiorari.]

[TITLE OMITTED IN PRINTING]

EMPLOYER'S EXCEPTIONS TO THE ADMINISTRATIVE JUDGE'S DECISION AND REQUEST FOR ORAL ARGUMENT

I. *Statement of the Case*

BAYSIDE ENTERPRISES, INC. is a Maine corporation whose principal office is located in Belfast, Maine. It employs approximately 80 people (53) in various jobs all having to do with the raising of poultry. Bayside owns all of the stock of Poultry Processing, Inc. (144) another Maine corporation who employs approximately 400 people (53) in various jobs having to do with both the processing of poultry and the milling of the feed for poultry.

The Bayside operation grows broilers, roasters, and capons; produces hatching eggs from breeder flocks; and conducts a pedigree breeding operation. It also buys hatching eggs when it needs them and sells both breeding stock and hatching eggs to other poultry companies (30).

Almost all of Bayside's poultry is sold to Poultry Processing, Inc. (100) although some has been sold to Fort Halifax Packing Company, another processing plant, and some Canadian canneries in Nova Scotia and New Brunswick (31, 122).

There are two hatcheries — a pedigree hatchery and a commercial hatchery. The small breeder pedigree hatchery is located in the town of Waldo, 5 miles outside of Belfast (58). This breeder hatchery is connected with six primary breeding farms which breed and select the strains or lines of birds of the type that is used in the broiler or roaster production business (34). It is necessary for Bayside to employ a full-time geneticist, Richard Koski, who is General Manager of the Breeder Department. He, with another man, helps select the basic breeders with the traits desired. This primary breeder operation has gone on since 1948 when it was established by buying eggs or chicks with the essential strains from other breeders (35).

The commercial hatchery is located in Unity, about 28 miles west of Belfast (58). There are eleven farms connected with it that produce eggs from breeding stock. This commercial hatchery's only function is to take in eggs and hatch chickens (36).

Besides the six breeder farms and the eleven commercial egg farms, Bayside has a contracted relationship with 119 independent farmers (37) for the growing of broilers and roasters. (Bayside itself owns approximately seven farms (130, 30) all of which at the present time are being used for the parent-grandparent operation (133-4).

Generally the farmer's responsibility is to supply the poultry house and to feed and look after the birds (78) while Bayside furnishes the chicks, the feed, fuel, medicaments and vaccines (39). Bayside also does the debeaking either at the hatchery or on the farm (63) as well as the blood testing (62). The farmer is paid on the basis of a guarantee for square footage plus a bonus based on the pounds of poultry he has produced (103).

The Bayside Broiler Department Manager Robert Desrosiers is directly concerned with what happens on each farm (134). He is in charge of the whole growing of poultry for meat production, the health of the poultry and the scheduling of both feed and poultry onto the farms (154).

He is superior to four poultry servicemen employed by Bayside (134) to regularly check on the flocks of the various farmers and take care that the poltry is fed and free from disease (175-176) (40-41).

Bayside also has eight farm managers and four farm employees that work on company-owned farms. There is also a special farm crew that move and grade poultry, clean the poultry houses, do vaccination and blood testing work and some of the breeder selection work.

The large commercial hatchery at Unity has a 14 person egg processing crew and a 14 woman chick processing crew. (See Respondent's Exhibit 5) This hatchery has two types of vehicles connected with it — a refrigerated vehicle for transporting eggs and a heated vehicle for transporting chicks (58). Each has a truck driver.

Besides a few office clerical people and a few employees at the breeder hatchery, the only other employees of Bayside are the six truck drivers employed in the feed move operation that are the subject of this controversy and their supervisor-dispatcher, William Plamondon.

Poultry Processing, Inc., the subsidiary of Bayside Enterprises, Inc., is divided into two distinct operations each under a different trade name (33). First there is the processing plant at a separate location at the east end of Belfast (58) about 1/4 mile from the central office (54) with its own procurement trucking system (32) for bringing in the live poultry from the farms in coops on flatbeds and it has other drivers that deliver the processed poultry to locations outside the state in refrigerated units (56-57). This operation goes under the name of Penobscot Poultry Co. (32).

The second operation is the feed mill located at Thorndike, Maine, 22 miles west of Belfast (58). This goes under the trade name of Penobscot Feeds (32).

The testimony is that the processing plant has a set of offices in which the manager, Gilbert Knight, in addition to a Mr. Dow, the operations manager; a Mr. Black, the personnel manager; and two salesmen are located. There are also offices for the Federal Inspection Service (55). All of the non-exempt personnel in the processing plant are represented by the Meatcutters and the Teamsters under a joint certification (9, 191, 53).

The feed mill at Thorndike, operated by Poultry Processing, Inc., has only two customers. Of the 120,000 tons per year (84) Fort Halifax Poultry Co. takes 1/3 of the production. The other 2/3 goes to the farms of Bayside. The 1/3 that Fort Halifax receives, constitutes 100% of its broiler feed (20). The 2/3rds that Bayside gets from the mill amounts to 80% to 85% of its total feed requirements (81-82). The balance comes from Knox-Lincoln Farmers Co-op (KLF) and is mostly feed for Bayside's breeder farms (81, 82).

Up to May 1, 1974, Poultry Processing owned all the ingredients that went into the feed and sold the feed to both Bayside and Fort Halifax. After May 1, Bayside

began to purchase all of its own ingredients (94) and Poultry Processing milled it on a fixed cost per ton (142) and charged Bayside for the milling. However, Poultry Processing continues to buy the ingredients for Fort Halifax and sell the manufactured product to it (97).

Feed is a manufactured agricultural product (23, 157). It is the source of protein to the poultry (157). It is made up of 80% corn and soy (45) and has approximately 25 other ingredients such as drugs, vitamins, minerals, amino acids, trace minerals and a growth stimulator (43). Fort Halifax makes up its own specifications for the type feed it uses (24) and Bayside also dictates to the mill the type of feed formula it requires (45).

Mr. Desrosiers, The Broiler Department Manager, decides what formula will be fed to the birds (46) depending upon certain variables. There is different feed requirement depending upon the type of bird being raised (broiler, roaster, capon).

Feed is categorized according to its composition (mash, crumbles, and pellets). Mash is the composition fed without further physical change in a blend (47). Crumbles (42) are round pellets broken up into small parts by a cracking roll. Pellets are the result of putting the mash into a steam pressure die system called a pellet mill (47).

It is very important when birds are young that they get a starter feed that carries higher fortification as far as vitamins and trace minerals. The quality of ingredients make for a higher price diet (48). As the birds become older, the form and the composition of feed changes (49). For example, one type of feed is used from 0 to 2 weeks; another from 2 to 6 weeks; another from 6 to 9 weeks; and 5 days prior to slaughter, a different feed where no restricted component such as a narcincal is used (41,49).

The feed is very expensive. It was testified to that at

the time of the hearing it was costing $160.00 per to[illegible] (127).

Besides the specie and age of the bird, the amount of feed consumed by the bird is affected by the general health situation of the flock and the temperature (when it is hot they eat less; when cold they eat more) (43, 65).

Just as Fort Halifax does not have a feed mill today, in the past Poultry Processing, Inc. did not have one and operated from a bulk receiving station located in Belfast (89,222).

A Mr. Lord is the manager of the feed mill (111). His second in command is Merle Weymouth. Weymouth's job is to see that the feed is made (175). These two men work for Poultry Processing, Inc. In another office (186) is William Plamondon who is the Bayside dispatcher (174). His job is to make sure the feed is delivered to the farms (175). His immediate supervisor is Desrosiers who speaks to Plamondon at least 10 times a day (175) with regard to feed delivery. Plamondon also must be in constant contact with the hatchery. The hatchery gives him a chick placement sheet so that he can make up a feed schedule for the truck drivers so that they will know which farm to deliver the feed. Plamondon also must be in touch with either the farm servicemen or the farmers themselves in case they are short of feed (73). Plamondon must speak to Weymouth about the mill's disease control because of the possibility of transmission of disease through the feed (137).

Plamondon must speak to Weymouth about the mill's disease control because of the possibility of transmission of disease through the feed (137).

Plamondon who is a fomer truck driver himself (177) is in charge of lining up the pay of the 6 truck drivers, making up a vacation schedule, seeing the feed trucks are loaded, and directing the drivers where to go and what to take there

(177, 216). The drivers themselves recognize that Plamondon is their immediate supervisor (220).

The biggest problem in the poultry raising industry is disease (24). Two of the most prevalent in Maine are the protozoan disease—cocksidiosis—and the virus—laryngotracheitis (Lt) (50). Disease control is extremely important (126). A diseased flock could have a mortality rate of as high as 20% although more usual is around 2% (99).

As early as the breeder-hatchery, medicaments are administered if there is a disease problem (48). The mill keeps a pail of disinfectant for all employees and visitors to prevent the transmission of disease through the feed (137). The corporate policy is to keep everyone away from the flocks including the truck drivers (127, 112) since particularly LT is spread mechanically by tracking it on boots or tires or by wild fowl (52, 50).

The truck drivers are responsible for sanitation control of themselves and their equipment while on the farms to prevent the transmission of communicable disease from feet, clothing, or equipment (136). In each Bayside truck there is a 12-quart pail, a foot pan, a bottle of disinfectant, a water bucket, and a sprayer, all used in the sanitation procedure (168). A driver must wash his boots before getting out of the truck (163). When he leaves the farm, he must spray his tires (163) and scrub his boots (51). Back at the feed mill he must wash his running gear with disinfectant (51, 164).

Mr. Desrosiers testified that the reason he does not use an independent trucker like Hodges is because to do so would forfeit his control over sanitation procedures in knowing where the independent driver has been prior to visiting one of his farms and being able to oversee the activities of the drivers and their vehicles (160). *He said that he feels that you just "can't take the chance" in sanitation control* (161).

The testimony with regard to the practice in the poultry industry as it concerns the transportation of feed is not consistent. Fort Halifax which buys its feed from Penobscot Feeds does not have feed drivers but hires Richard Hodges, an independent trucker, to pick up and deliver its feed (20). Bayside delivers 85% of its own feed in its own trucks with its own drivers but has the balance delivered by the drivers employed by the Knox-Lincoln Farmers Co-op. In the past, however, and even sometimes today, Bayside drivers pick up the feed in Rockland and transport it to the farms (185, 82, 218). Bayside, unlike Fort Halifax today, used its own drivers even when it didn't have a feed mill (222, 89). Some fully independent growers who own their own poultry have their own feed trucks and send them to KLF for the feed instead of having it delivered by KLF (75-76). The choice of the method of transportation of feed varies.

Bayside owns four feed farms (63) with capacities of 14 to 25 tons (66). Each truck has several compartments so that different feeds or split loads can be delivered by the same driver (66). Each compartment holds about 3 tons (163). The trucks have a conveying device on the bottom and an unloading device—either an air pump or auger (66, 51).

The Bayside farms are mostly in Waldo County and all within a 12 to 15 miles average from the feed mill (53). Bayside has its own fuel pump for its trucks (143). The Bayside trucks all carry the logo "Bayside Enterprises, Inc." The Poultry Processing trucks all say "Penobscot Poultry Co." although they are registered to Poultry Processing (57).

The six Bayside drivers work in two shifts. Three from 3 a.m. to 1 p.m. while the other three work from 1 p.m. to 9 p.m. (174). A driver goes to three or four farms a day

(64) but not necessarily does he regularly haul to the same farms (175).

His time is divided roughly equally between driving on the road and unloading on the farms with a much smaller amount loading the feed at the mill (162, 167). The average farm receives a feed delivery once a week although some see a feed delivery more than once a week (63-64). The driver spends on the average from ½ to 1 hour on each farm (201).

While the Poultry Processing truck drivers are hired by a personnel man at Poultry Processing (57), the responsibility to hire a new truck driver for feed delivery for Bayside would fall on the Broiler Department Manager since that department is so vitally concerned with what happens on the farms (134). Poultry Processing drivers both haul the live poultry to the processing plant after picking it up at 9:30 p.m. for processing at 7 a.m. the next morning (55, 190) and also drive the processed birds to market (55). There is a driver named Smart who works for Poultry Processing whose only job is to transport certain animal by-products of the processing plant to the feed mill for inclusion in the formula (137). Fort Halifax Packing also sells feathers to the Penobscot Feeds (21, 117).

The routine of a Bayside driver after reporting to work at the feed mill (112) which is at a central location is to get his schedule (73) from the dispatcher, load his truck from the specified bin with the type of feed indicated on his delivery slip (177). (Sometimes the truck is already waiting for him preloaded (168). The feed is weighed on the scale at the mill (69). There is no scale on the farms to measure how much feed is coming in (48). Then the driver takes the weight ticket along with a feed sample to be left with the farmer (for the purpose of pinpointing the day of any possible contamination) (69, 157, 177) and drives to either one or two farms with his load (217).

After going through the sanitation procedure on the farm, the driver either asks the farmer if he has multiple bins where he wants the feed and how much in each, or finds a message left for him concerning this (67, 51). The driver then connects the equipment either by air delivery or by auger and the feed truck is unloaded at about 2½ to 3 minutes a ton (51). The driver must be present at the unloading to change compartments on the truck and see that there is no difficulty (67). When the unloading is finished, he presents the feed sample and the weight slip to the farmer, sometimes having coffee with him; disassembles the unloading equipment; washes his boots; gets back in his truck and leaves either for the mill or another farm (51).

The responsibility of the drivers to the farmer is extremely great. The evidence shows that the farmer has no way to check to see if he is getting the amount of feed that the weight slip the driver presents to him indicates. It is therefore a matter of trust between the driver and the farmer that the driver doesn't deliver the feed somewhere else (70). This is particularly important since the bonus system is based on production costs and feed represents 60-70% of input (125).

The Bayside driver fills the farmer's bins in his own discretion if the farmer is not around (200) and with the specific type of feed that that age and type of poultry demands (158). A mistake could ruin the whole flock (67).

The driver's responsibility for proper sanitation cannot be overemphasized. Besides the procedures already indicated the wrong placement of his truck near the poultry house can suck the virus out of that building through the truck and contaminate another farm from the interior of the truck (159).

The feed must be of a specific moisture content. If it is snowing or raining the driver must be careful to open one

bin at a time so as to prevent excess moisture (159). To prevent mold he must make sure that the old feed is at the bottom of the bin before he unloads new feed (158-159).

In addition there is a responsibility in the very driving of the truck onto the farm. The birds in the poultry house are very dense (1½ broilers per square foot; 1 roaster per square foot). Any undue or extraordinary light or noise could make the birds stampede which would have the effect of their piling into a corner and smothering. It is for this reason that the driver must drive the shiny metal feed truck in such a manner as to prevent a reflection into the windows of a poultry house (73-74). There is evidence that at least one of the drivers is also an independent contract grower (138).

The only other factual matter in the record that has not been fully commented on is the relationship between Bayside and Poultry Processing. As has been previously reported, Bayside is the farm company and is recognized as such by the U.S. Department of Agriculture (128) as well as being a member of the Knox-Lincoln Farmers' Cooperative which makes being in the business of farming one of the qualifications (75). Poultry Processing buys live birds from other suppliers besides Bayside although Bayside is the major source (56). Title passes at the growing farm (33) contrary to the Administrative Law Judges finding on page 4 line 2 of the decision.

There is a conscious attempt to separate the two corporations (143). The main office in Belfast is the point in which there is some crossover, but even here an allocation of expenses is made to reflect the true cost situation as to each (143).

For example, there are 12 in the accounting office; 2 on the clerical payroll of Bayside; 7 on the clerical payroll of Poultry Processing; and 3 who do joint work for each. These 3 are John Phillips, the controller of both corporations (141); an office manager and an accountant (152).

The only other man involved in both corporations is Herb Hutchins, to whom the plant managers of both Penobscot Poultry and Penobscot Feeds report (139) as well as the top Bayside personnel.

Money actually changes hands between Bayside and Poultry Processing by writing checks. There are two cash receipt books and two cash disbursement books. There are invoices between the two for various charges including the sale of the poultry (141), feed, fuel, and an administrative expense charge (14[illegible]). This type of arrangement is not uncommon (25).

• • •

BAYSIDE ENTERPRISES, INC.
PENOBSCOT POULTRY COMPANY
POULTRY PROCESSING, INC.
BY (s) ALAN J. LEVENSON
ALAN J. LEVENSON

Portland, Maine
October, 1974

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[The Decision and Order of the National Labor Relations Board are omitted from this Appendix as they are printed on pages A-7 and A-8 of the Petition for a Writ of Certiorari.]

[The Opinion of the United States Court of Appeals for the First Circuit is omitted from this Appendix as it is printed on pages A-1 through A-5 of the Petition for a Writ of Certiorari.]

[The Decree of the United States Court of Appeals for the First Circuit is omitted from this Appendix as it is printed on page A-6 of the Petition for a Writ of Certiorari.]

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No. 75-1267

In the Supreme Court of the United States

OCTOBER TERM, 1975

BAYSIDE ENTERPRISES, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 527 F. 2d 436. The Board's decision and order (Pet. App. A7-A22) are reported at 216 NLRB No. 92.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1975 (Pet. App. A6). The petition for a writ of certiorari was filed on March 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether truck drivers, who transport feed from their employer's mill to independent farms under contract with the employer to raise poultry hatched in his hatchery facilities, are employees, rather than agricultural laborers, and thus covered under the National Labor Relations Act.

STATUTES INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), and of the Fair Labor Standards Act, as amended (52 Stat. 1060, 29 U.S.C. 201, *et seq.*), are set forth at page 2 of the petition.

STATEMENT

1. Petitioner Bayside Enterprises, Inc., operates chick hatcheries and breeding farms in Belfast, Maine (Pet. App. A10; Tr. 34-37, 129-130).[1] Bayside has contracts with 119 independent growers or farmers in the area around Belfast for the care and feeding of the chickens from the age of one day until they are ready for processing for market (Pet. App. A11; Tr. 30-31). Petitioner Poultry Processing, Inc., a wholly owned subsidiary of Bayside, operates a mill at Thorndike, Maine, which supplies feed to the independent farms as well as to another poultry firm (Pet. App. A11-A12; Tr. 80-81, 84-85). Most of the poultry raised by the contract farms for Bayside is sold to Poultry Processing and processed for market at a plant owned by Poultry Processing (Pet. App. A12; Tr. 54-55, 190-191).[2] Although Bayside and Poultry Processing have separate employees, they have common officers and directors, a single corporate office, and a single controller

[1]"Tr." references are to the transcript of testimony before the Board, a copy of which has been lodged with the Clerk of this Court.

[2]Employees at this plant (which operates under the name of Penobscott Poultry Company), including crews who transport the live poultry from the contract farms to the plant, are jointly represented by Truck Drivers, Warehousemen, and Helpers of America Local 340, International Brotherhood of Teamsters, and Amalgamated Meat Cutters Local 385 (Tr. 54-55, 191).

(Pet. App. A13; Tr. 79, 88, 147-148, 152-153). They have common management and common control over labor relations (Pet. App. A13; Tr. 9-13, 40, 139-140).

Bayside furnishes feed, medicine and other supplies to the independent farmers and occasionally sends employees to the farms to observe the care given to the chickens and to determine if medical attention is needed (Pet. App. A11; Tr. 40-41). The contract between Bayside and the farmers ("growers") provides that "the Grower, his agents and employees shall not be considered to be employees of Bayside for any purpose whatsoever" (Pet. App. A28). The farmers provide the land, the facilities, and the labor for raising the poultry (Pet. App. A11; Tr. 78). A farmer's compensation for raising the poultry is ordinarily determined by the weight of the flock at maturity less the cost of the feed and materials supplied (Pet. App. A15, A23-A28; Tr. 101-105, 110-111, 125). Title to the chickens remains in Bayside until after they leave the farms for processing (Pet. App. A11-A12; Tr. 40).

Bayside employs 6 truck drivers to deliver feed from the mill at Thorndike to the independent contract growers who are situated, on the average, from 12 to 15 miles from the mill (Pet. App. A13; Tr. 53, 182). The drivers are supervised by a mill supervisor and dispatcher who makes up delivery schedules (Pet. App. A13-A14; Tr. 112, 135, 164-165, 174-179, 213-225).

The feed trucks are loaded and weighed at the mill, sometimes by the drivers and sometimes by the dispatcher (Pet. App. A14; Tr. 69, 177, 181-183, 199-200). In either case, the drivers are given slips telling them how much feed of a particular type to deliver to a given farm (Pet. App. A14; Tr. 176-177). The drivers then drive to the contract farms where they unload the feed into bins designated by the farmers (Pet. App. A14; Tr. 67,

200). The drivers' responsibilities include putting the proper amounts of feed into the designated bins, trying to keep rain out of the bins when unloading in bad weather, spraying their boots and trucks with disinfectant to avoid spreading poultry diseases, and driving their trucks carefully so as to avoid disturbing the chickens by loud noises and bright reflections from headlights (Pet. App. A14-A15; Tr. 67-68, 74).

The drivers have no direct contact with the poultry (Pet. App. A15; Tr. 112). Less than half of the drivers' time is spent at the farms; the remainder is spent at the feed mill and in driving (Pet. App. A14-A15; Tr. 166-167). The drivers deliver feed to three or four farms a day (Pet. App. A15; Tr. 64), spending from half an hour to an hour at each farm (Tr. 201). They drive approximately 100 to 120 miles each day (Tr. 224).[3]

In October 1973, the Union[4] requested recognition as the representative of Bayside's drivers who deliver feed from the Thorndike mill to the contract farms (Pet. App. A11). Bayside recognized the Union and began contract negotiations (Pet. App. A11; Tr. 11). However, after several sessions, Bayside broke off bargaining negotiations on the ground that the drivers were agricultural employees and hence not covered by the Act (Pet. App. A11; Tr. 13, 16).

2. Upon charges filed by the Union, the Board found that Bayside and Poultry Processing constituted a single

[3]In addition to making deliveries to the contract farms, the drivers have also on occasion delivered feed from another feed mill to breeder farms owned by Bayside, and have transported feed ingredients from Rockland, Maine, and Gloucester, Massachusetts, to the feed mill at Thorndike (Pet. App. A15-A16; Tr. 112-114).

[4]Local 340 of the Teamsters, one of the representatives of the processing plant employees (n. 2, *supra*).

employer ("Bayside") for purposes of the National Labor Relations Act (NLRA). The Board further found that, while Bayside's own breeding farms and hatcheries may constitute branches of farming, the feed mill and feed delivery operations were not farming, and that the feed truck drivers' duties were incidental to the operation of the feed mill and not to Bayside's farming operations. (Pet. App. A18-A19.) Accordingly, the Board concluded that the drivers were not "agricultural laborers" but rather "employees" within the meaning of Section 2(3) of the NLRA, that they constituted an appropriate unit for bargaining, and that Bayside thus violated Section 8(a)(5) and (1) of the NLRA when it refused to bargain with the Union for that unit (A20). The Board entered a bargaining order (Pet. App. A21-A22, A7-A8).

3. The court of appeals enforced the Board's order (Pet. App. A1-A5). The court upheld the Board's finding that Bayside and Poultry Processing were a single employer, "a multi-faceted organization whose enterprises and purposes go beyond the bounds of farming" (Pet. App. A4). The court also held that Bayside was not a farmer "for that portion of its business which supports the raising of poultry on contract farms" and that thus the feed mill drivers were not employed "incidental to or in conjunction with" Bayside's own farming operations (Pet. App. A5). Consequently, they were not exempt from the NLRA as agricultural laborers (*ibid.*).

ARGUMENT

1. Section 2(3) of the NLRA excludes from the definition of employee "any individual employed as an agricultural laborer." Since 1946, riders to the Board's appropriation acts (*e.g.*, 60 Stat. 698; 87 Stat. 763) have regularly provided that the term "agricultural laborer" shall be defined in accordance with Section 3(f) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(f), which reads:

> "Agriculture" includes farming in all its branches and * * * includes * * * the raising of * * * poultry, and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations * * * .

This Court has held that the FLSA definition has two distinct parts. The first relates to actual farming operations, and the second "includes any practices whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations." *Farmers Reservoir & Irrigation Co.* v. *McComb,* 337 U.S. 755, 763. The activities included in the second portion of the definition, however, must actually be performed on a farm, and be incidental to the farming operations of that farm. *Id.* at 766, n. 15; *Bowie* v. *Gonzalez,* 117 F.2d 11, 18 (C.A. 1); *Mitchell* v. *Hunt,* 263 F.2d 913 (C.A. 5). See also *National Labor Relations Board* v. *Olaa Sugar Company,* 242 F.2d 714, 718 (C.A. 9); cf. *Boyls* v. *Wirtz,* 352 F.2d 63 (C.A. 5).

The court of appeals correctly applied these principles in rejecting petitioners' contention that the feed mill drivers came within the second part of the definition because they were performing services incidental to Bayside's farming operations.[5] As the court stated (Pet. App. A4-A5):

> The bulk of the capital and personnel of Bayside is devoted to the feed mill and the processing plant operations which are concededly not farming. The company does operate chick hatcheries and breeding farms which do constitute farming under the applicable statutes. 29 C.F.R. §780.125(b) (1974). In the remaining segment of the business, the raising of

[5]The court followed its earlier decision in *National Labor Relations Board* v. *Gass,* 377 F.2d 438 (C.A. 1).

> chickens to maturity, the actual farming activity is done by the contract farmers. According to current Department of Labor regulations, retention of title to the poultry pending maturity on contract farms does not entitle a business to be classified as a farmer. 29 C.F.R. §780.126 (1974).[4] Nor does Bayside's delivery of feed, however crucial to the development of poultry on the contract farms it may be, justify classifying Bayside as a farmer. Rather, the Bayside feed delivery system is part of a separate organization, supportive of agricultural activity, but not directly engaged in farming. See 29 C.F.R. §780.126 (1974) * * * .

[4]"Feed dealers and processors sometimes enter into contractual arrangements with farmers under which the latter agree to raise to marketable size baby chicks supplied by the former who also undertake to furnish all the required feed and possibly additional items. Typically, the feed dealer or processor retains title to the chickens until they are sold. Under such an arrangement . . . [t]he activities of the feed dealer or processor . . . are not 'raising of poultry' and employees engaged in them cannot be considered agricultural employees on that ground . . . ."

The court properly relied on the Department of Labor regulations; since the regulations were promulgated by the agency in charge of enforcing the FLSA, they are entitled to great weight. *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 139-140. Moreover, the regulations are consistent with analogous case law involving similar contractual arrangements for growing or processing an employer's product. See *Mitchell* v. *Huntsville Wholesale Nurseries, Inc.,* 267 F. 2d 286 (C.A. 5); *Wirtz* v. *Jackson & Perkins Co.,* 312 F. 2d 48, 51 (C.A. 2); *Elm Spring Farm* v. *United States,* 127 F. 2d 920 (C.A. 1).

2. While we believe it is correct, the decision of the court below is in conflict with decisions of other courts of appeals. Thus, in *National Labor Relations Board* v.

Strain Poultry Farms, Inc., 405 F. 2d 1025, the Fifth Circuit held that, in a poultry raising operation similar to that here, the agricultural exemption applied to the employer's (Strain's) truck drivers, who hauled chickens to market from farmers under contract with Strain to grow them to maturity. In the court's view (*id.* at 1032), "[t]he fact that Strain hired the independent growers to raise its birds and contract loaders to catch the birds for loading onto its trucks would not seem to destroy its claim to having raised the poultry." The Ninth Circuit, following *Strain*, reached the same conclusion in a substantially identical situation. *National Labor Relations Board* v. *Victor Ryckebosch, Inc.*, 471 F. 2d 20. Moreover, in *Abbott Farms, Inc.* v. *National Labor Relations Board*, 487 F. 2d 904, and *McElrath Poultry Co., Inc.* v. *National Labor Relations Board*, 494 F. 2d 518, the Fifth Circuit extended *Strain* to exempt from the NLRA feed mill employees and employees who transport feed to and from the employer's mill. See also *Wirtz* v. *Tyson's Poultry, Inc.*, 355 F. 2d 255 (C.A. 8).

The court below purported to distinguish *Strain* and *Abbott* on the ground that the employers there were primarily engaged in traditional agriculture and, unlike petitioners, owned no processing plant to slaughter and dress the poultry (Pet. App. A5). We submit, however, that the underlying rationale for the court's decision is directly at odds with that of *Strain* and *Abbott*, as well as of the other contrary decisions which the court did not specifically attempt to distinguish.[6] The analysis of the court below rests on the premise that Bayside's farming

[6]The court below did indicate that it found the contrary decisions unpersuasive (Pet. App. A3).

operations are limited to its hatcheries, which are separate from its feed mill operations, and that the independent farmers who are under contract to raise Bayside's poultry to maturity are engaged in their own farming. Thus services furnished by Bayside's feed mill drivers are incidental to its feed mill operations, rather than to any farming operations. The other courts have rejected this basic premise.

3. The question presented is a recurring one in the administration of the NLRA. Thus, in *Colchester Egg Farms, Inc.*, 214 NLRB No. 64, the Board reaffirmed its position in the instant case, and has filed an application for enforcement in the Second Circuit (No. 76-4052).[7] As petitioners note (Pet. 9), there are serious practical objections to having a conflict in the circuits on this issue.[8] Moreover, resolution of the issue would have a direct impact on cases arising under the FLSA (see *Wirtz* v. *Tysons Poultry, supra*), as well as on those arising under other statutes which refer to agricultural laborers or employees (see Pet. 11, n. 13).

[7]The Board has requested the Second Circuit to hold the proceeding in abeyance until this Court rules on the instant petition.

[8]For example, petitioners' earlier attempt to have the instant case reviewed in the Fifth Circuit (see 514 F. 2d 475 (C.A. 1), 515 F. 2d 503 (C.A. 5)) demonstrates that the conflict among the circuits furnishes a strong inducement for forum shopping.

The Commission on Revision of the Federal Court Appellate System has identified the question presented here as one that has too long escaped authoritative resolution. *Structure and Internal Procedures: Recommendations for Change* (1975), A152-A153.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1267

BAYSIDE ENTERPRISES, INC.,
PENOBSCOT POULTRY COMPANY,
and POULTRY PROCESSING, INC.

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

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Vertical Coordination via Contract Farming, Economic Research Service, U.S. Department of Agriculture, Miscellaneous Publication No. 1073, p. 74, *et seq.* (1968) 10

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Court of Appeals (Pet. app. A. 1-5) is reported at 527 F.2d 436. The Board's Decision and Order (Pet. app. A. 7-22) are reported at 216 NLRB No. 91.

Jurisdiction

The judgment of the Court of Appeals was entered on December 10, 1975 (Pet. app. A. 6). The Petition for a Writ of Certiorari was filed March 8, 1976 and was granted on May 19, 1976. The jurisdiction of this court rests on 28 U.S.C. 1254 (1).

Statutes Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 2 * * *

* * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parents or spouse, or any individual having the status of independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * *

Since 1946, riders to the Board's appropriation acts (e.g., 60 Stat. 698; 87 Stat. 763) have regularly provided that the term "agricultural laborer" shall be defined in accordance with Section 3(f) of the Fair Labor Standards Act (F.L.S.A.) 29 U.S.C. 203(f).

* * *

The relevant provisions of the Fair Labor Standards Act, as amended (52 Stat. 1060, 29 U.S.C. 201, *et seq.*) 29 U.S.C. 203(f):

> 3(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in Section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

Question Presented

Whether the Court of Appeals correctly determined that the Board's decision that employees of a poultry organization vertically integrated from hatcheries to processing plant, who transport feed from the company's feed mill to its contract farms are covered "employees" rather than exempt "agricultural laborers" under the National Labor Relations Act as defined in the Fair Labor Standards Act.

Statement

Bayside Enterprises, Inc. and Poultry Processing, Inc. are parent and subsidiary corporations engaged in poultry hatching, breeding, raising, processing, and marketing in central coastal Maine. Like many other poultry organizations these days, the companies, which have been found to be one joint enterprise, are made up of several elements.

There is a breeder hatchery at Waldo with six primary breeder farms connected to it (A. 11), a commercial hatchery at Unity with eleven farms connected to it (A. 11), and a feed mill at Thorndike that produces 80-85 percent of the feed required by the Bayside contract farmers (A. 24-25). At the time of the hearing, one-third of the production of this mill was sold to an unconnected company[1] (A. 26). Also located at Thorndike with a separate office for its dispatcher (A. 49) is the feed move operation whose drivers are the subject of this case. They deliver all of the Bayside medicine and feed produced at the mill to the Bayside contract farmers (A. 42). The other one-third of the production of the feed mill that is sold to an unconnected company, is transported to their contract farms by an independent trucker (A. 6). There is also a processing plant at Belfast (A. 17-18) that processes all of the Bayside Poultry (A. 35), and a general business office at Belfast where the General Manager, Comptroller, Breeder Department Manager, Broiler Department Manager, and the accounting office is located (A. 8, 60). Over two-thirds of the 119 contract farms are located within a 12 to 15 mile radius of the feed mill (A. 17).

Beside the feed drivers that deliver the feed and medicines in specialized trucks, the enterprise has other truck drivers that transport eggs to breeder farms and chicks to the contract farms (A. 18). Attached to the processing

[1] The Company's feed mill now is used exclusively for its own production needs.

plant under separate supervision are truck drivers that catch, coop, and deliver the birds from the contract farms to the processing plant (A. 50-51). There are farm supervisors who check the health of the poultry on a regular basis at the farms (A. 13, 45), and there is a full time farm crew that take blood tests, debeak and vaccinate the poultry, and clean the poultry houses after each flock is taken out (A. 19). The company also employs a full time geneticist to constantly improve the strain (A. 10). The ownership of both feed and poultry is at all times in Bayside.

The enterprise has organized itself so that the 400 employees of the processing plant and the feed mill are paid by Poultry Processing, Inc. The other 80 working at and for the hatcheries, breeding and contract farm, are paid by Bayside Enterprises Inc.[2]

Argument

THE COMPANY'S SIX FEED DRIVERS ARE "AGRICULTURAL LABORERS" AND THEREFORE EXEMPT UNDER SECTION 2(3) OF THE NATIONAL LABOR RELATIONS ACT.

I. INTRODUCTION AND SUMMARY

The combination of Section 2(3) of the NLRA exempting "agricultural laborers" with the annual appropriation rider for the NLRB defining those words under Section 203(f) of the Fair Labor Standards Act have produced this controversy over the eligibility of the appellants to fall within that definition.[1] *Farmers Reservoir & Irrigation*

[2] The Petitioners can accept the factual findings of the Administrative Law Judge (Pet. app. A. 9-16). In the appendix there is a more complete annotated rendition of the facts (A. 66-77).

[1] " 'Agriculture' includes farming in all its branches and . . . includes . . . the raising of . . . poultry and any practices . . . performed by a farmer or on a farm as incident to or in conjunction with such farming operations . . ."

Co. v. *McComb*, 337 U.S. 755, 762-63 (1949) has pointed out that the FLSA section has two distinct parts — (1), actual farming operations and (2), "any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidentally to or in conjunction with 'such' farming operations." *Id.* at 763.

Since the work of the feed drivers in loading, transporting, and delivering feed to their employer's contract farms is not actual farming, Bayside contends that their work falls within the secondary branch of farming. To so qualify, their employer must be a farmer and their own work must be incidental to such farming.

The conflict within the National Labor Relations Board and between the circuits centers upon the first of those requirements, namely, is a poultry organization such as this a "farmer." The question of the work being incidental to farming in this particular case has much less significance because if the company is a farmer it follows that the work of the drivers is incidental to that farming.

The rejection of the classification "farmer" for Bayside and companies like it by the NLRB and the First Circuit has two distinct generic roots. The first emphasizes the contract farmers, maintaining that it is they and not the company who are raising the poultry. The second argument stresses the processing plant, urging that it gives the whole company a commercial coloration that predominates over any farming aspect.

The company maintains that both the contract farmers and the processing plant are but parts of a whole, integrated operation that has as its essence the raising and marketing of its own poultry and as such it is a "farmer."

II. Bayside as a Farmer

A. *Bayside as Less Than a Farmer — The Growout Contract*

The principal argument against Bayside being a farmer centers upon the growout contract with its farmers. This is the arrangement whereby the birds from its hatcheries and breeding farms are placed upon farms belonging to others until they grow to maturity (a typical contract and a duplicate of Exhibit 1 can be found at Page A. 23 of Pet. App.)

From the contract farmer's point of view, he agrees to keep and maintain suitable facilities for the flocks, including adequate housing, water, feed, oil storage, and dead bird disposal facilities, according to Bayside's specifications. He also agrees to follow Bayside's directions in the care and management of each flock, to use only Bayside materials for feeding and maintenance, and to have no other poultry on his farm during the contract period (Pet. App. A. 26-27).

Bayside furnishes the chicks, feed, fuel, litter, medicaments, and vaccines, makes the decision when and what kind of poultry are placed on each farm, what they are fed (A. 15), what medicines, vaccines, and blood tests are administered, and when to remove each flock from the farmer's premises (A. 45). Bayside maintains a farm crew that watches over these farms and cleans out the poultry houses after each flock is removed (A. 20).

In return for his services and the use of his facilities, the farmer is guaranteed payment on the basis of the square footage in his poultry house plus a bonus based on the pounds of poultry he has produced in relationship to his production costs with the rest of the growers (A. 30). This contract arrangement between the farmer and the company is the focal point in the clash between the argu-

ments over whether the farmer is an integral part of the poultry company or whether he is an independent entrepreneur.

In the brief for the Respondent, on the petition for certiorari in this case, there are cited three cases as examples of analogous contract arrangements with the Bayside growout contract (p. 7). They are *Mitchell* v. *Huntsville Wholesale Nurseries, Inc.*, 267 F.2d 286 (5th Cir. 1959) rose growers; *Wirtz* v. *Jackson & Perkins Co.*, 312 F.2d 48, 51 (2nd Cir. 1963) nursery stock; and *Elm Spring Farm* v. *United States*, 127 F.2d 920 (1st Cir. 1942) milk handler. Petitioners have also found another case favorable to the Respondent, *Waldo Rohnert Co.* v. *NLRB*, 322 F.2d 46 (9th Cir. 1963) seed growers.

However, Petitioners feel that these cases not only do not support Respondent, but make clearer the distinction of a vertically integrated poultry grower.

In *Mitchell* v. *Huntsville, supra*, although Huntsville supplied the growers with the plants, it only paid them "based on an agreed amount for each *merchantable* plant produced" 267 F.2d 289 for 2.[2]

In *Jackson & Perkins, supra*, although the growers provided the land, labor and equipment, they agreed to indemnify the company for any claims arising out of the farming operations. The growers also bore any loss due to crop failures save for the cost of the original understock, and the developed stock was *sold* by them to the defendant at a price calculated per *saleable* plant. 312 F.2d 48, 51.

The *Elm Spring Farm* case, *supra*, was a promotion by a company to a group of dairy farmers to claim the milk received from the farmers was its own and thereby escape

[2] The same Fifth Circuit in *NLRB* v. *Strain Poultry Farms, Inc.*, 405 F.2d 1025, 1033 (5th Cir. 1969) distinguished *Huntsville* saying the stock was *purchased* and that the growers were not employees or agents of the company.

making payments to an equalization pool. The court properly disregarded what it called an "elaborate camouflage" since at any time the cooperative could make the farmer take back title to a cow or the farmer himself could demand a retransfer of all the cows on 90 days notice. The risk of loss in the production of milk remained upon the individual farmer. 127 F.2d 920, 926.

In the *Rohnert Co.* case, *supra*, the growers also did not receive compensation under the seed contract for any crop seed which was not as to quality and grade acceptable to Rohnert "as acceptable merchantable seed" and the grower had to pay Rohnert for any planting seed supplied by it if the planting seed failed to produce a crop or produced undergrade crop seed. 322 F.2d 46, 47.

The common thread in these cases was the fact that the farm product had to be marketable, saleable, or acceptable to the company and thus the risk of loss fell on the farmer.[3]

The First Circuit looks upon the Bayside-farmer arrangement and labels it in "support" of the raising of poultry, 527 F.2d 436, 438. It thus rejects the argument in *NLRB* v. *Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969) that companies such as *Strain, Bayside*, and other vertically integrated poultry organizations are engaged in farming in its primary sense.

What *Strain* points out is that it is the poultry company that continually retains the ownership of the birds and assumes the risk of loss throughout the entire process. It also assumes the risk of market fluctuations which affect the price of the birds. This is unlike the previous contractor-

[3] Even in *Johnston* v. *Cotton Producers Association*, 244 F.2d 553, 554 (5th Cir. 1957), the case quoted in the Department of Labor interpretation 29 C.F.R. 780.126 (1972) relied upon by the First Circuit, the Exchange *sold* the baby chicks to the farmer-customer, but retained title as security for the purchase price and for advances for feed, supplies or equipment.

farmer examples in which it is the farmer that accepted this risk.

In *Wirtz* v. *Tyson's Poultry, Inc.*, 355 F.2d 255 (8th Cir. 1966) the situation is very much like Bayside with a corporation and two subsidiaries that together make up a single integrated egg producer. There the court said at Page 258:

> ". . . the appellees (Tyson) are farmers and the ones who initiate the farming operations here involved. Without appellees the independent growers arguably would never have undertaken the initial and continuing cost of acquiring the birds and producing the eggs. The contract growers merely *aid* the appellees, who the District Court found to be the ones qualified to claim the agricultural exemption . . ."

The point is that it is not the poultry company that is supporting the farmers, but it is the farmers who are aiding the company in raising the poultry.

Whether you define the relationship as an agency, subcontractor, or in substance as a lease by the company of the farm, equipment, and labor (A. 12), the elements of entrepreneurship have been shifted by contractual agreement from the farmer to the contractor-company. *Vertical Coordination via Contract Farming, Economic Research Service U.S. Department of Agriculture,* Miscellaneous Publication No. 1073, p. 74 *et seq.* (1968). It is this shifting that makes the farmer an integral part of the company. The income of the farmer is not affected by the market price at the time the poultry leaves his farm and he is guaranteed at least a minimum preset price, no matter what the market.

B. *Bayside As More Than A Farmer — The Processing Plant*

The Court of Appeals decision in this case although using the independent contract farms argument also makes a

different argument grounded in the company's ownership of a processing plant for its poultry. The decision states that the Court's previous decision in *NLRB* v. *Gass,* 377 F.2d 438, 444 (1st Cir. 1967) was predicated on the fact that the truckdrivers there were employed by an integrated poultry *processing* company. The decision characterizes Bayside as a multifaceted organization whose enterprises and purposes go beyond the bounds of farming. It points to the feed mill and processing plant where it says the bulk of the capital and personnel are, and notes that these are "concededly" not farming. Finally, it denies the farm exemption distinguishing other contrary opinions because those companies were engaged in "traditional" agriculture with no processing plant. The court finishes by saying Bayside's operations are not "predominantly" agriculture.

Although there are certain elements in this commercial argument that find their root in the independent contract farmers argument (i.e. if the farmers were indeed independent then the processing plant would actually be a commercial enterprise since it was processing the products of different farms and different farmers, *Bowie* v. *Gonzalez,* 177 F.2d 11, 18 (1st Cir. 1941)) the major point is like that articulated by the Supreme Court of Washington in *Fors Farms, Inc.* v. *Washington State Employment Security Dept.,* 75 Wash 2d 383, 450 P.2d 973 (1969). There the court said that a corporation engaged in processing chickens and manufacturing chicken feed was no[4] an exempt employer because basically its operation was . mmercial processing company seeking a stable supply o. chickens, rather than a farming operation seeking a way of marketing products.[4]

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[4] The *Fors Farms* case was a particularly difficult one as it involved processing plant employees who had previously been covered by the unemployment law and now that their plant had been merged with a farmer, he argued that they should be exempt.

This theory that in a poultry company the entire organization is incidental to the processing plant rather than the reverse is not in keeping with a view of the company as a single enterprise concerned with all aspects of growing, raising, and selling its own product.[5]

In *NLRB* v. *John W. Campbell, Inc.*, 159 F.2d 184 (5th Cir. 1947) the court said at Page 187

> "no farmer, dependent upon that which he produces to sustain his operations, could long exist if he could not market that which he produces . . . the wheat farmer must thresh his wheat; the cane grower must cut his cane and make its juice into syrup; the cotton grower must gin and bale his cotton; the citrus grower must pick and pack his oranges; and the tomato grower must do likewise. So long as these undertakings are in preparation and packing by him for market of that which he has grown on his farm, the labor necessary thereto is agricultural labor."

The court went on to say that if you bought, packed or marketed the products of another, that was commercial; while if you packed products from your own farm, that was agricultural, and that the growing, harvesting, packing, and selling of your own product was all part of a single enterprise (agriculture) 159 F.2d 184, 187.

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[5] In *Abbott Farms, Inc.* v. *NLRB*, 487 F.2d 904, 905 (5th Cir. 1973) the court in referring to the trucking operation from the feed mill of Abbott said in referring to *Strain*, "There, as here, the question was whether the poultry raiser was conducting a trucking operation (feed mill) on the side or whether the operation (mill) was part of a poultry raising venture; — Bayside in this case would similarly contend that not only its trucking, but its processing plant was part of a whole poultry-raising enterprise. This does not necessarily mean that the work of every employee automatically is classified as "agricultural labor" only that Bayside is a "farmer" under the F.L.S.A. *Maneja* v. *Waialua*, 349 U.S. 254 (1954).

The Maine Supreme Judicial Court has spoken directly on this issue in construing its unemployment statute. In *Maplewood Poultry Company* v. *Maine Employment Security Commission*, 151 Me. 467, 472, 121 A.2d 360 (1956) the court said "we are not aware of any decision which labels the business of raising poultry as a business enterprise."

In *Etchechoury* v. *Avi-Simplot, Inc.*, 93 Idaho 438, 462 P.2d 737 (1969) the highest court of that state exempted employees of the company processing plant from the employment law as agricultural laborers where the employer owned breeder and poultry farms and processed only his own poultry.[6]

In the *McElrath Poultry Co.* case, 206 NLRB No. 94 enf. denies *McElrath Poultry Co., Inc.* v. *NLRB*, 494 F.2d 519 (5th Cir. 1974) the company was a subsidiary of a parent company with a processing plant. There the drivers in the feed move operation were ruled exempt as agricultural laborers despite the processing plant.

Petitioners question whether in a typical vertically integrated operation that produces all the poultry it processes or to put it another way, processes all it produces, it is possible to characterize the entire operation by the predominant motivation (i.e. to assure a stable market for poultry; to seek a way to market the product).[7]

If it is, it would seem the more important aspect would be to sell a saleable product; and in the absence of a live market for poultry, the birds must be processed (A. 18). See *DiGiorgio Fruit Corp.*, 80 NLRB 853, 855-857 (1948).

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[6] The court said, "The test as to what constitutes agricultural labor turns not on the size of the farming operation involved but rather on whether the processor is in reality a farmer-producer, and whether the processing is incidental to such farming." 462 P.2d 737, 741.

[7] There are, however, obvious cases, *Hersey Estates*, 112 NLRB 1300 (1955) (a chocolate maker who provided recreational facilities)

C. *Bayside As A Poultry Raiser — The Employing Entity*

Of extreme importance in all of this discussion and of absolute necessity before the question of "raising poultry" can be resolved, is what is the employment entity we are discussing. *Farmers Reservoir,* 337 U.S. at Page 760 says that whether a particular type of activity is agricultural,

> "... is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations. The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity."

That case itself demonstrated this principle by example when the Court ruled the separately organized water company there involved to be a non-farmer.[8] In *NLRB* v. *Kent Bros. Transportation Co.*, 458 F.2d 480 (9th Cir. 1972) an independently organized trucking company that transported the produce of others was similarly held covered by the NLRA.

Thus, in each case, the answer to the question of which entity is the person employed and paid by is sometimes determinative of his status, *Vives* v. *Serralles,* 145 F.2d 552, 555 (1st Cir. 1944).

In the poultry industry, whether because of the newness of the vertically integrated form of business, the use of

[8] The court at Page 766 went on to clarify, "... it is equally clear that it does constitute a practice performed as 'an incident to or in conjunction with' farming. If the act exempted all such practices, the company would be exempt. But the exemption is limited. Such practices are exempt only if they are performed by a farmer or on a farm."

multiple corporations, or the fact that the nature of the business requires several quite different elements, there has always been some confusion about just what was the employing entity. In the *Gass* case before the NLRB, the trial examiner wrote that Gass was "either an integral part of this integrated commercial enterprise (Lipman) which has engaged in commerce or else it was an independent trucking concern hauling for a commercial enterprise which, in turn, was engaged in commerce", 154 NLRB 728, 746. The Board said the same feed drivers were employed by joint employers, 154 NLRB 728, 732-733. When the case reached the Court of Appeals, the court said, "It is significant that these drivers are not employed or paid by the farms nor are they under the control of the farmers", *NLRB* v. *Gass,* 377 F.2d 438, 444 (1st Cir. 1967).

When the First Circuit decided this case it found Bayside "a multi-faceted organization" and agreed with the administrative law judge "that Bayside and its component parts constitute a single employer with common ownership management and control of labor relations." Further it stated that Gass was part of an integrated poultry processing company, *NLRB* v. *Bayside Enterprises, Inc.,* 527 F.2d 436 (1st Cir. 1975).

The court went on to say, however, that although Bayside could not be classified as a farmer for that portion of its business which supports raising of poultry on contract farms, it was a farmer in relationship to its chick hatcheries and breeder farms. 527 F.2d 438-439.

The court has, therefore, formulated a rule whereby the vertically integrated company as a whole would not be regarded as engaged in primary agriculture, but parts of it would, i.e., the hatcheries and breeder farms.[9] In support

[9] From the company's point of view the employing entity has also not been free from doubt. The case was tried before the Administrative Law Judge on the theory that only the feed drivers' employer, Bayside Enterprises, Inc., was the farmer and that the subsidiary Poultry Processing, Inc. was not.

of the denial of the whole company's status as a farmer, the court cited the Department of Labor interpretation 29 C.F.R. 780.126 (1972) that begins "Feed dealers and processors sometimes enter into contractual arrangements with farmers . . .".

Although Bayside – Poultry Processing as a single enterprise owns a feed mill and a processing plant, it, as an organization, cannot be classified as either, nor does the statutory exemption depend on the concept of ownership. The FLSA makes specific reference to the *raising* of poultry. It is by this standard Bayside seeks to be judged. *North Whittier Heights Citrus Assn.*, 10 NLRB 1269 (1939). Is it raising poultry?

Bayside begins its poultry program with the hiring of a full-time geneticist (A. 10) who selects the basic breeders and the traits desired in the birds to be grown. There is a breeding hatchery with four or five breeding farms which breed and select strains or lines of birds (A. 10) and there is a commercial hatchery with eleven breeding farms attached to it whose function is to take in eggs and hatch chicks (A. 11). When the chicks are one day old, they are placed on the contract farms (A. 23) and stay there for about nine weeks. Whether on one farm or the other, Bayside's farm crew debeak, vaccinate, and blood test the flocks (A. 19, 20). The company decides which farmers raise which birds (A. 43) and initiates a feed program. This requires designing the composition of the feed and seeing that it is changed at least four times during the growing cycle (A. 13-14). In addition, the company has four field supervisors to check each farm on a routine basis (A. 13). A preventive program is maintained for poultry disease, but should it break out, the company treats the poultry using both feed and water (A. 64). It delivers the feed to the farms and picks it up when no longer needed (A. 22). It delivers the chicks to the farms and catches, coops and delivers the

fully grown birds to the processing plant (A. 51). The size of the operation is substantial as at any one time there are 3½ million birds (A. 20), all of which are subsequently processed by the processing plant (A. 35).

It is important to understand that there is a central management of this whole operation from egg to processing that is coordinating and making the strategic economic decisions. This emanates from a separate main office in Belfast with a general manager (A. 77) and a common controller (A. 76). Also located there is the broiler department manager, who coordinates the scheduling of both feed and chicks to the farms. In addition he is in charge of the continued health of the flocks (A. 68). This puts him in contact on a daily basis with farm managers, farm servicemen, the dispatcher at the feed mill, the pick up crews, and the farmers themselves (A. 62, 64).

Besides the pick up crew that comes from the processing plant to the farms, there is a driver who delivers animal by-products from the processing plant to the feed mill for inclusion in the feed (A. 74). The feed formula is watched very carefully, not just because of the type and age of the poultry, but because of the weather and because of price changes and availability of ingredients (A. 14).

The advantage of owning all elements of a poultry organization, besides the coordination advantage, is the opportunity to control as many variables as possible. Bayside does not grow its own grains nor does it retail its chickens, but in all other respects, its ownership or control allows it more flexibility than otherwise. It is no longer necessary to make a profit on the passing from one stage to another. This has allowed greater cost efficiency with a consequent price decline and a consumption increase. *The Broiler Industry: An Economic Study of Structure, Practices and Problems,* U.S. Department of Agriculture (1971).

There is no doubt that in the past there have been different forms used in the poultry industry that arguably were not agriculture. Certainly an independent feed dealer[10] or an independent food processor[11] were not in agriculture. However, where the company is hatching, breeding, participating actively in the growing and then processing its own product, it should be considered a farmer, *NLRB* v. *Strain Poultry Farms, Inc.*, 405 F.2d 1025, 1032-35 (5th Cir. 1969); *Etchechoury* v. *Avi-Simplot, Inc.*, 43 Idaho 438, 462 P.2d 737, 741.

There is nothing in the history of the NLRA,[12] nor the history of the passage of the 1946 rider[13] that would deny this exemption. When this Court regarded the fact that Waialua was using a railroad to transport its sugar cane from the field to the mill, it said, "There is no reason to construe the FLSA so as to discourage modernization . . ."[14]

The poultry industry has merely borrowed the vertically integrated structure from industry, or to put it another way, has reverted back to the small, self-contained family farm it was in the 1920's on a much larger scale. *The Broiler Industry, supra.*[15]

Nor is there any compelling social reason for placing the vertically integrated poultry company in the commerce column. Through Section 13(a)(6), the agricultural exemption has been narrowed and most recently in 13(g) the

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[10] *Johnston* v. *Cotton Producers Association*, 244 F.2d 553 (5th Cir. 1957).

[11] *George I. Petit, Inc.*, 89 NLRB 710 (1950).

[12] *Legislative History of NLRA*, p. 3202 and 54 Cal. L. Rev. 1939, 1955, fn. 72.

[13] *NLRB* v. *Kelly Brothers Nurseries, Inc.*, 341 F.2d 433, 435, fn. 2.

[14] *Maneja* v. *Waialua*, 349 U.S. 254, 261.

[15] The agricultural exemption of the N.L.R.A. is not measured by the magnitude of the farmer's planting nor the prolifigacy of his harvest. *Local Union No. 300* v. *McCulloch*, 428 F.2d 396, 399 (5th Cir. 1970).

exemptions have been restricted even more, excluding any employee who works for a controlled establishment with a gross volume of sales exceeding $10,000,000. Congress, by modifying 3(f) in the same manner, could include most vertical integrators in the NLRA. It, however, has not shown the inclination to do so. *NLRB* v. *Victor Ryckebosch, Inc.*, 471 F.2d 20, 21 (9th Cir. 1972). Indeed there is a good argument that like the construction industry, because of the complex character of the problem, special treatment is indicated. 25 *Labor Law Journal* 241.

To hold this company nonagricultural, is not merely what the minority in *Colchester Egg Farms, Inc.*, 214 NLRB No. 64 (1974) says is to compartmentalize what is essentially a total farming activity, but is, in effect, to "process" Bayside as Bayside processes its broilers — chopping off its head by disregarding the importance of its management to the whole organization and then dismembering it into parts.

What is needed is an approach viewing the vertical integrator as engaged in primary agriculture and then an inquiry as to whether a specific employee's work is "incidental to or in conjunction with" that agriculture.

III. The Feed Drivers as Being Incidental to and in Conjunction With Farming.

The employer has centered its feed move operation in the middle of its contract farms. With four trucks and six drivers. Bayside delivered feed to the farms itself even when it did not have a feed mill (R. 89, 222). The drivers only deliver Bayside feed. There is a separate office at the mill for the dispatcher where the drivers report because it is the most central point (A. 17). *NLRB* v. *Olaa Sugar Company*, 242 F.2d 714, 718 (9th Cir. 1957). The testimony is that the purpose in having your own feed move operation rather

than subcontracting is to maintain control over contamination (A. 42). This is so because the duties of the drivers are not just positive ones such as loading, transporting, and unloading, but are also negative ones, such as preventing the transmission of disease, the contamination of the feed, and scaring of the flocks (A. 42).

In *Farmers Reservoir,* this court said that the delivery of water was a practice performed as an incident to or in conjunction with farming, 337 U.S. 755, 766. So, too, is the delivery of feed to poultry.[16] The evidence is that each farm must receive a delivery at least once a week (A. 20). See *Wirtz* v. *Oscealo Farms Co.,* 372 F.2d 584 (5th Cir. 1967).

Other courts have held that the feed drivers as well as even the feed mill employees themselves are engaged in raising poultry, *Abbott Farms, Inc.* v. *NLRB,* 487 F.2d 904 (5th Cir. 1973), *McElrath Poultry Co., Inc.* v. *NLRB,* 494 F.2d 518 (5th Cir. 1974). They are like the field men in *Fors Farms, Inc.* v. *Washington State Employment Security Dept.,* 450 P.2d 973, 976 and the servicemen, pick up crews, and grain crews (feed truck drivers) in *Maplewood Poultry Co.* v. *Maine Employment Security Commission,* 151 Me. 467, 121 A.2d 360 (1956). Basically, each class of employee is offering a service to the grower concerned with the raising of poultry. See also *Birmingham* v. *Rucker's Breeding Farm,* 152 F.2d 837, 840 (8th Cir. 1945). The feed driver is intimately involved in the growth and protection of the birds whose feed and medicine he delivers.

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[16] The Court of Appeals adheres to its disjunctive approach to Bayside, "... the Bayside feed delivery system is part of a separate organization, supportive of agricultural activity, but not directly engaged in farming." 527 F.2d 436, 438. This ignores the testimony of the dispatcher concerning the integration of the feed delivery with the hatchery, the broiler department manager, and the farmers (A. 45, 46). Even the birds themselves have more control over feed delivery than the dispatcher (A. 14, 21).

Conclusion

The judgment of the Court of Appeals should be reversed and the case remanded with instructions to enter a decree denying enforcement of the Board's order and dismissing the case for want of jurisdiction.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1976

BAYSIDE ENTERPRISES, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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B. W. Marion and H. B. Arthur, *Dynamic Factors in Vertical Commodity Systems: A Case Study of the Broiler System* (Ohio Agricultural Research and Development Center, 1973) 23

F. D. Reed, *The Maine Poultry Industry: Its Impact, Growth and Competitive Position* (Univ. of Maine, Cooperative Extension Service, Circular 394, Rev. July 1970) 33

U.S.D.A., Packers and Stockyards Administration, *The Broiler Industry: An Economic Study of Structure, Practices and Problems* (1967) 22

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A5) is reported at 527 F. 2d 436.[1] The Board's decision and order (Pet. App. A7–A22) are reported at 216 NLRB 502.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1975 (Pet. App. A6). The petition for a writ of certiorari was filed on March 8, 1976, and granted on May 19, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

[1] "Pet. App." refers to the appendix to the petition and "A." to the separate appendix printed pursuant to Rule 36, "Tr." refers to the original transcript of the Board hearing.

STATUTES INVOLVED

1. Section 2(3) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), provides in pertinent part that "The term 'employee' * * * shall not include any individual employed as an agricultural laborer * * *."

2. Since 1946, the appropriation acts for the National Labor Relations Board have regularly carried a rider linking the definition of the term "agricultural employee" to the definition of "agriculture" in Section 3(f) of the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U.S.C. Sec. 203(f). The latest such rider (90 Stat. 23) provides in relevant part as follows:

> *Provided,* That no part of this appropriation shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in section 2(3) of the Act of July 5, 1935 (29 U.S.C. 152), and as amended by the Labor-Management Relations Act, 1947, as amended, and as defined in section 3(f) of the Act of June 25, 1938 (29 U.S.C. 203) * * *.

3. Section 3(f) of the Act of June 25, 1938 (29 U.S.C. 203; the Fair Labor Standards Act) provides in pertinent part, as follows:

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities * * * the raising of livestock, bees, fur-bearing animals, or poultry, and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

QUESTION PRESENTED

Whether truck drivers, who transport feed from their employer's mill to independent farms that are under contract with the employer to raise poultry hatched in his hatchery facilities, are employees, rather than agricultural laborers, and thus covered under the National Labor Relations Act.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. Petitioner Bayside Enterprises, Inc. operates chicken hatcheries and breeding farms near Belfast, Maine, the site of its corporate offices (Pet. App. A–10 to A–11; A. 8–10, 18). As detailed below, Bayside has contracts with 119 independent farmers (hereinafter "the growers") in the area around Belfast for the care and breeding of the chickens from the age of one day until they are ready for processing for market. Petitioner Poultry Processing, Inc., a wholly-owned subsidiary of Bayside, operates a mill at Thorndike, Maine, which supplies feed to the growers as well as to another poultry firm (*infra,*

pp. 6–7).[2] The truck drivers whose status is at issue here haul feed from the mill to the growers. Poultry Processing also owns a processing plant at Belfast, which handles the poultry raised by the growers (Pet. App. A–11 to A–13; A. 8–9).

Employees on the processing plant payroll transport live poultry from the farms to the plant, slaughter and dress the poultry, and ship it out to buyers (Pet. App. A–12; A. 8–9).[3] These employees, including the crews who collect the grown birds from the growers and transport them to the processing plant, are members of a bargaining unit jointly represented by the Amalgamated Meat Cutters Local 385 and the Truck Drivers, Warehousemen and Helpers Union, Local 340.[4] The latter organization (the Union) also represents the feed truck drivers (Pet. App. A–10 to A–11; A. 17, 51).

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[2] The court of appeals affirmed the Board's finding that Bayside and Poultry Processing constitute a single employer, and petitioners are not challenging that finding in this Court (Br. 5 n. 2; cf. 15 n. 9). The term "Company," as used herein, refers to both Bayside and Poultry Processing.

Petitioner Penobscot Poultry Company is a defunct subsidiary of Bayside, providing a trade name for products sold by Poultry Processing (Pet. App. A–12; A. 39).

[3] The plant employees, together with those on the Poultry Processing payroll who work at the feed mill, total over 400 (A. 17). The feed truck drivers are carried on Bayside's payroll (Pet. Br. 5).

[4] In the printing of the appendix, the agreement of petitioners' counsel to a stipulation on this matter was inadvertently omitted. The omitted sentence, which would appear as the last line on A. 51, is "MR. LEVENSON: Yes."

The 119 independent growers who contract with Bayside take chickens from its hatchery and raise them for a specified time, at the end of which they are marketable as broilers, capons, or roasters (Pet. App. A–11, A–23 to A–29, A. 8–11).[5] Bayside retains title to the poultry throughout this operation; title passes to its processing subsidiary when the chickens are cooped for delivery to the processing plant (Pet. App. A–27 A. 9–10). The grower furnishes housing for the flock, water, storage areas for supplies, and the equipment and labor required to raise the chickens to maturity (Pet. App. A–11, A–26).

In addition to supplying the chicks, Bayside provides poultry feed, fuel, and medications, and it makes available the services of four of its employees who periodically check on the health of the flocks and vaccinate the poultry against diseases when this appears necessary (Pet. App. A–11; A. 13, 19–20). These employees are under the supervision of Bayside's broiler department manager, who also determines the composition of the feed supplied to the growers (Pet. App. A–13, A–14; A. 13–14, 40).

Although the contracts between Bayside and the growers guarantee the growers fixed payments per square foot of space occupied by the flocks at given intervals, a grower's total compensation includes a "bonus" determined by the weight of the poultry he

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[5] The contract expressly provides "[t]hat the Grower, his agents and employees shall not be considered to be employees of Bayside for any purpose whatsoever" (Pet. App. A–28).

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raises to maturity and his production costs in relation to the corresponding figures for the other growers (Pet. App. A–15, A–24 to A–25 to A–28; A. 30, 34). Payments are normally calculated separately for each successive flock placed on a farm, although the terms of each contract remain in effect "for successive flocks as may be placed by mutual agreement" (Pet. App. A–23 to A–27; A. 30).

In addition to contracting with the growers for the raising of poultry, Bayside owns and operates, using its own employees, six breeder farms on which new poultry strains are bred and two hatcheries—the "commercial" hatchery from which chicks are supplied to the growers and a "pedigree" hatchery connected with the breeder farms (Pet. App. A–11; A. 8–11).[6] The feed for flocks on Bayside's own breeder farms and on a few of the contract farms which raise capons and roasters rather than broilers is supplied by the feed mill of Knox-Lincoln Farmer Co-op (KLF) (Pet. App. A–12, n. 2; A. 24–25, 34, 69). The deliveries of feed from this source are generally made by drivers employed by KLF (Pet. App. A–15 to A–16; A. 25, 49).

Most of the growers, however, are supplied with feed from the Company's mill at Thorndike. At the time of the Board hearing, approximately two-thirds of the mill's output went to the contract growers,

[6] The Bayside employees who work on the breeder farms and in the hatcheries are among the approximately 80 persons petitioners identify as employees of Bayside (A. 17, 60–62).

and the remaining one-third was sold to the Fort Halifax Packing Co., an unrelated poultry company which, like Bayside, contracts with independent growers for the raising of poultry to be processed in its processing plant, but which does not have its own feed mill (Pet. App. A–12; A. 5–7, 25–26).[7]

The feed supplied to the contract growers by the Company's mill is delivered to the farms by truck drivers working in two shifts; at the time of the Board hearing there were six such drivers (Pet. App. A–13; A. 44–45). Feeding schedules for the various flocks are made up by the Company's broiler department manager and copies are sent to the dispatcher at the mill, who is responsible for preparing delivery schedules for the farms (Pet. App. A–15; A. 45–46, 59). The dispatcher supervises the feed drivers, and reports to the assistant feed mill manager (Pet. App. A–13; A. 47–48).

The drivers begin their regular duties by loading their trucks with feed at the mill and then weighing the loaded trucks; the drivers are given slips telling them how much of a particular type of feed to deliver to the farm or farms they are scheduled to visit that day (Pet. App. A–14; A. 22, 46, 48, 53). The drivers then drive to the contract farms, where they dis-

[7] Feed deliveries to farms under contract with Fort Halifax are made by an independent hauler, who is paid by Fort Halifax for this service (Pet. App. A–12; A. 6–7). On some occasions, in the event of equipment failure, Bayside has that hauler deliver feed from its mill to some of its contract growers (Pet. App. A–16; A. 35).

charge the feed into bins.[8] If a grower is not present to indicate which bins he wants filled, he may leave a note for the driver (Pet. App. A–14; A. 22, 54). The drivers' responsibilities include putting the proper amounts of feed into the bins, keeping rain out of the bins when unloading in bad weather, spraying their boots and trucks with disinfectant to avoid spreading poultry diseases, and driving their trucks carefully to avoid disturbing the chickens with loud noises and bright reflections from headlights (Pet. App. A–14 to A–15). The drivers wash their trucks after they return to the mill (Pet. App. A–15).

The drivers have no direct contact with the poultry (Pet. App. A–15; A. 32). Less than half their time is spent at the farms, since a small portion is spent at the mill and the remainder is equally divided between driving on the road and unloading at the farms (Pet. App. A–15; A. 43–44). The contract farms are approximately 12 to 15 miles from the mill, and the drivers deliver to three or four of these farms on each work day (Pet. App. A–15; A. 17, 21). The drivers spend between half an hour and an hour on each farm, and they drive approximately 120 miles each day (A. 54, 58).

In addition to making deliveries to the contract farms, the drivers have also on occasion delivered feed from the KLF feed mill to the six breeder farms owned by Bayside, and have transported feed ingredients from Rockland, Maine, and Gloucester, Massachusetts, to the Company's feed mill (Pet. App. A–15 to A–16; A. 25, 32–33, 54–56).

[8] The discharge is accomplished by power equipment, and takes two and one half to three minutes per ton (A. 16–17).

2. In October 1973, the Union requested recognition as the representative of the drivers. Bernard Lewis, the president of Bayside and Poultry Processing, recognized the Union on behalf of Bayside and began contract negotiations. However, after several negotiating sessions, the Company broke off bargaining. Lewis informed a Union representative that the Company believed it was not obligated to bargain further because the drivers were agricultural employees and hence were not covered by the National Labor Relations Act (Pet. App. A–10 to A–11).

B. THE BOARD'S DECISION

The Board, adopting the decision of its Administrative Law Judge, found that Bayside and Poultry Processing were a single employer for purposes of the Act, and that, taken together, they "constitute a multifaceted organization whose enterprises and purposes go far beyond the bounds of traditional farming" (Pet. App. A–18). The Board further found that the operation of the Company's feed mill was not farming within the meaning of the definition in Section 3(f) of the FLSA, and that the work of the feed truck drivers was incident to the operation of that mill (Pet. App. A–18 to A–19).

The Board found that the feed truck drivers are not "agricultural laborers," that they constitute an appropriate unit for purposes of collective bargain-

ing, and that the Company violated Section 8(a) (5) and (1) of the Act by refusing to bargain with the Union which was the representative of the drivers. It issued an appropriate remedial order. (Pet. App. A–7 to A–8, A–20 to A–22.)

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals enforced the Board's order. It found that "the bulk of the capital and personnel of the Company is devoted to the feed mill and processing plant operations, which are concededly not farming" (Pet. App. A–4). Although the Company "does operate chick hatcheries and breeding farms which do constitute farming," in respect to "the raising of chickens to maturity, the actual farming activity is done by the contract farmers" (*ibid.*). The feed truck drivers are not agricultural laborers, the court held, because they are not employed in work incidental to the Company's own farming operations, but rather perform duties which are part of a "feed delivery system" which functions as "a separate organization" (Pet. App. A–4 to A–5).

SUMMARY OF ARGUMENT

I

The National Labor Relations Act does not apply to "any individual employed as an agricultural laborer," as defined in Section 3(f) of the Fair Labor Standards Act, which defines "agriculture" to include "farming in all its branches and any practices * * * performed by a farmer or on a farm as an incident

to, or in conjunction with, such farming operations, including preparation for market." The work performed by the feed truck drivers whose status is at issue here does not come within either the "primary" branch of this exemption, covering actual farming operations, such as the cultivation of crops or the raising of poultry, or the "secondary" branch, comprising "any practices" performed either "by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations." See *Farmers Reservoir & Irrigation Co.* v. *McComb,* 337 U.S. 755, 762–763.

II

1. It is well settled that, in order to constitute "practices * * * performed by a farmer * * * as an incident to, or in conjunction with such farming operations," the work in question must relate to the farming operations of the employer claiming the exemption, as distinguished from the farming operations of other farmers. The Company's farming operations are limited to its hatcheries and breeder farms and do not include the operations on the 119 contract farms where the independent growers raise the Company's poultry.

The Company's contrary contention relies on decisions by the Fifth, Eighth, and Ninth Circuits holding that, in similar contract farming relationships, the farming operations of the growers are the operations of the contracting company which owns the poultry. But these decisions are inconsistent with

an interpretive ruling by the Department of Labor (29 C.F.R. 780.126) and with court decisions dealing with contract farming arrangements for the production of other agricultural and horticultural commodities. Furthermore, the cases on which the Company relies oversimplify or misconceive important elements of the contract farming relationship, such as the division of risk of loss and the existence of supervisory services. In the present case, the relationship between the Company and its growers indicates that the growers are independent contractors rather than agents or employees of the Company and that the Company is not the "farmer" raising the poultry. This conclusion is also consistent with the legislative history of a 1966 amendment of the FLSA relating to the agricultural exemption, which indicates that Congress considers the growers, and not the integrated poultry producers with which they contract, to be the farm unit.

2. Since the Company's farming is limited to its hatcheries and breeder farms, the feed delivery operation is not "part of the [Company's] agricultural venture" (see *Maneja* v. *Waialua Agricultural Co., Ltd.*, 349 U.S. 254, 264–265), and the drivers are not performing practices incident to the Company's farming operations. Less than twenty percent of the Company's workforce is involved in its actual farming operations: the Company's business, in the aggregate, is not farming. The record shows that the drivers in question have relatively little contact with the

small farming segment of the enterprise, and that they are supervised by individuals at the Company's feed mill, which supplies feed to farms other than those which the Company owns and operates.

III

The drivers are not within the other half of the secondary branch of the agricultural exemption, since they do not perform work "on a farm as an incident to, or in conjunction with such farming operations". The legislative history of that portion of the definition of agriculture in Section 3(f) of the Fair Labor Standards Act reveals that Congress wished to exempt work, such as the threshing of wheat, which is performed substantially, if not entirely, on a farm by an employee of a company performing a specialized agricultural function and which is carried out as part of actual farming operations, even though not performed by the farmer or his employees. The delivery of supplies such as poultry feed to a farmer is essentially the final phase of a separately organized manufacturing operation.

Moreover, the most significant portion of the drivers' work takes place off the farm, and thus is not done "on a farm". Since the National Labor Relations Act covers workers whose work is substantially nonagricultural, even though they perform some agricultural work, the drivers' on-farm work is not in any event sufficient to bring them within the agricultural exemption.

...

220-043—76——3

ARGUMENT

TRUCK DRIVERS WHO TRANSPORT FEED FROM THEIR EMPLOYER'S MILL TO INDEPENDENT FARMS WHICH UNDER CONTRACT WITH THE EMPLOYER RAISE POULTRY HATCHED IN HIS HATCHERY FACILITIES ARE EMPLOYEES, RATHER THAN AGRICULTURAL LABORERS, AND THUS ARE COVERED UNDER THE NATIONAL LABOR RELATIONS ACT

A. INTRODUCTION

Section 2(3) of the National Labor Relations Act provides that the term "employee" shall exclude "any individual employed as an agricultural laborer." Since 1946, the appropriation acts for the Board have carried a rider which provides that the term "agricultural laborer" shall be defined in accordance with Section 3(f) of the Fair Labor Standards Act ("FLSA").[9] Section 3(f) of the FLSA defines the term agriculture in pertinent part as follows:

[9] As one court has observed, "The 1946 rider was the product of heated debate and of sharp conflict between the two houses, which unfortunately sheds relatively little light on its interpretation." *National Labor Relations Board* v. *Kelly Brothers Nurseries, Inc.*, 341 F. 2d 433, 435 n. 2 (C.A. 2). However, it is noteworthy that the version offered by Congressman Elliott, which the House first adopted, would have defined "agricultural labor" as it was defined in the Social Security Act Amendments of 1939, 53 Stat. 1377. 92 Cong. Rec. 6689–6692 (1946). (A modified version of that provision is now codified in 42 U.S.C. 410(f).) As Senator McCarran later reported, however, the House and the Senate "were in complete disagreement * * * on what is known as the Elliott rider," and the conference committee finally agreed to substitute a provision referring to the definition of agriculture in Section 3(f) of the FLSA. 92 Cong. Rec. 9514 (1946). Senator Ball, a member of the conference committee, characterized the definition of "agricultural laborer" in the Social Security Act as "very broad" and the FLSA section as "a much narrower definition" to which counsel for the National Labor Relations Board had no real objection because only "a few minor changes in [the Board's] present procedure and definition" would be called for. *Ibid.*

The language of the state statutes construed in two cases relied upon by the Company (Br. 13) is virtually identical to language of the "broad" definition incorporated in the Elliott rider which the Senate rejected. See *Etchechoury* v. *Avi-Simplot, Inc.*, 93 Idaho 438, 462 P. 2d 737, 739; *Maplewood Poultry Co.* v. *Maine Employment Security Comm'n*, 151 Me. 467, 121 A. 2d 360, 361–363.

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil * * * the raising of livestock, bees, fur-bearing animals, or poultry, and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

As this Court noted in *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 762–763, this definition has "two distinct branches." The "primary" branch—"farming in all its branches"—includes actual farming operations such as the raising of produce from the soil or the raising of poultry; and the "secondary" branch includes "any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations" (*ibid.*).

Petitioners properly concede (Br. 6) that the feed truck drivers do not perform work that would bring them within the "primary" branch of the agricultural exemption, *i.e.*, that delivering truckloads of poultry

feed from a mill is not equivalent to raising poultry. Accordingly, petitioners must satisfy the "secondary" branch of the definition by showing that those drivers perform work by a farmer or on a farm, and also that the work is an incident to or in conjunction with the farming operations involved. As we show below, neither of these tests is met.

B. THE DRIVERS' DUTIES DO NOT CONSTITUTE PRACTICES PERFORMED BY A FARMER AS AN INCIDENT TO OR IN CONJUNCTION WITH HIS FARMING OPERATIONS

From the earliest days of the FLSA the Wage and Hour Division of the Department of Labor, which is responsible for administering the statute, and the courts have construed the phrase "practices * * * performed by a farmer * * * as an incident to, or in conjunction with, such farming operations" to refer to practices related to the farming operations of the farmer claiming the exemption, as distinct from the farming operations of other farmers. *Waldo Rohnert Co.* v. *National Labor Relations Board,* 322 F. 2d 46, 48–49 (C.A. 9); *Mitchell* v. *Hunt,* 263 F. 2d 913, 916–917 (C.A. 5), quoting from Department of Labor Interpretive Bulletin No. 14, para. 10(f) (August 1939), 1940 WHM 185; *National Labor Relations Board* v. *Olaa Sugar Co.,* 242 F. 2d 714, 718 (C.A. 9); *Bowie* v. *Gonzalez,* 117 F. 2d 11, 18 (C.A. 1), cited with approval in *Farmers Reservoir & Irrigation Co.* v. *McComb, supra,* 337 U.S. at 766–767 n. 15; Department of Labor Interpretive Bulletin, 29 C.F.R. 780.137.

Indeed, the Company (Br. 11–12) concedes this point. Thus, the thrust of its argument (Br. 6, 7–10)

is that the raising of poultry on the contract farms is part of its own operations and that the duties of the truck drivers are performed as an incident to or in conjunction with this poultry raising. Stated otherwise, it is the Company's contention that the poultry feed delivery operation is a subordinate part of the Company's agriculture venture—that venture being defined to include the raising of poultry by the growers on the contract farms.

We submit that the Board and the court of appeals properly found, to the contrary, that the Company's farming operations were limited to its own breeder farms and hatcheries, and that the duties of the truck drivers were practices incident to the operation of the Company's feed mill rather than to its farming operations. Cf. *Maneja* v. *Waialua Agricultural Co., Ltd.,* 349 U.S. 254, 263, 265.

1. The independent growers, not the Company, raise the poultry on the contract farms

The Company contracts with growers to raise its chickens in the growers' facilities located on the growers' farms. This operation is connected at one end to the Company's hatcheries and feed mill and at the other end to the Company's processing plant where the poultry is slaughtered and dressed for sale. In 1961, the Wage and Hour Division of the Department of Labor issued an interpretive bulletin concerning the status of such arrangements under Section 3(f) of the FLSA (26 Fed. Reg. 10386), and the interpretation is still adhered to by that agency in

substantially the same form. The interpretation presently states (29 C.F.R. 780.126):

§ 780.126 Contract arrangements for raising poultry.

> Feed dealers and processors sometimes enter into contractual arrangements with farmers under which the latter agree to raise to marketable size baby chicks supplied by the former who also undertake to furnish all the required feed and possibly additional items. Typically, the feed dealer or processor retains title to the chickens until they are sold. Under such an arrangement, the activities of the farmers and their employees in raising the poultry are clearly within section 3(f). The activities of the feed dealer or processor, on the other hand, are not "raising of poultry" and employees engaged in them cannot be considered agricultural employees on that ground. Employees of the feed dealer or processor who performs work on a farm as an incident to or in conjunction with the raising of poultry on the farm are employed in "secondary" agriculture (see §§ 780.-137 *et seq.*, [explaining that work must be performed in connection with the farmer-employer's own farming to qualify as "secondary" agriculture by a farmer] and *Johnston* v. *Cotton Producers Assn.*, 244 F. 2d 53).[10]

An interpretation such as this—made by the agency responsible for administering the statute in question—is "entitled to great weight." *United States* v. *American Trucking Assn.*, 310 U.S. 534, 549. As this

[10] In Section C, *infra*, we show that the truck drivers are not employed in "secondary" agriculture by virtue of the fact that part of their work is performed on the growers' farms.

Court has observed, interpretations of the FLSA by the Department of Labor, ' while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140. Both the court of appeals (Pet. App. A–4 n. 4), and the Board thus properly relied on this interpretation."[11]

However, the administering agency's conclusion that contractors like the Company are not themselves engaged in the raising of poultry has been rejected by the Fifth, Eighth, and Ninth Circuits in decisions relied upon by the Company (Br. 8–10, 19). *National Labor Relations Board* v. *Ryckebosch, Inc.*, 471 F. 2d 20 (C.A. 9); *National Labor Relations Board* v. *Strain Poultry Farms, Inc.*, 405 F. 2d 1025 (C.A. 5); *Wirtz* v. *Tyson's Poultry, Inc.*, 355 F. 2d 255 (C.A. 8).[12] As

[11] The Board's decision does not cite the interpretation, but it relies on an earlier Board decision, *McElrath Poultry Co., Inc.*, 206 NLRB 354, enforcement denied, 494 F. 2d 518 (C.A. 5), in which the interpretation is cited (206 NLRB at 355 n. 4).

[12] *Tyson's*, the earliest of these decisions, is not flatly inconsistent with the Labor Department's interpretation, since the contracting arrangement there was somewhat different from the one described in the interpretation: the contractor placed laying hens with growers for the production of eggs, which were then handled, cooled, graded, candled, and packed by the contractor's employees (who were found to be agricultural laborers). Moreover, as one state court has pointed out, only 27 percent of the eggs handled by the contractors' employees were produced by the growers; the remaining 73 percent came from the contractor's own farms. *Fors Farms, Inc.* v. *Washington State Employment Security Dept.*, 75 Wash. 2d 383, 450 P. 2d 973, 977. However, *Strain*, *supra*, which

we show below, the Company's contention, based on these authorities, that it is engaged in the raising of poultry by virtue of its arrangements with the contract growers is inconsistent with court decisions dealing with contract farming arrangements for the production of other agricultural and horticultural commodities, and it misconceives the contract farming relationship.

a. The division of risk between the grower and the Company indicates that the grower, not the Company, is the farming unit

The Company (Br. 8–10), tracking the rationale of *Tyson's, supra,* 355 F. 2d at 260, and *Strain, supra,* 405 F. 2d at 1033, stresses that it retains title to the chickens from the day they are hatched to the time they are sold as processed broilers. The Company does not—nor can it properly—contend that continuing ownership of the poultry itself suffices to make the Company a farmer, for the courts have generally rejected this proposition.[13]

involved a contractor-feed dealer like those described in the interpretation, relied and elaborated upon the *Tyson's* rationale; and *Ryckebosch, supra,* in which the poultry contractor owned not only a feed mill, but also a processing plant and a few farms of its own (see *Victor Ryckebosch, Inc.*, 189 NLRB 40, 41–42), relied on *Strain* without substantial discussion. The Fifth Circuit subsequently relied on *Strain in Abbott Farms, Inc.* v. *National Labor Relations Board*, 487 F. 2d 904, and on *Abbott Farms* in *McElrath Poultry Co., Inc.* v. *National Labor Relations Board*, 494 F. 2d 518. Neither decision turns on the extent of integration of the poultry contractor involved, although the court in *Abbott* noted that the contractor there owned no processing plant.

[13] *Waldo Rohnert Co.* v. *National Labor Relations Board, supra,* 322 F. 2d at 47 (seed mill company not a farmer by virtue of its contracts with farmers to grow vegetable seed crops using company-supplied seed, even though the company retained legal title to the growing crops and seed); *Wirtz* v. *Jackson & Perkins Co.*, 312 F. 2d 48 (C.A. 2) (contractor not a farmer although it provided understock to growers raising plants for the contractor's nursery business); *Mitchell* v. *Huntsville Wholesale Nurseries, Inc.*, 267 F. 2d 286, 289 n. 2 (C.A. 5) (contractor not a farmer by virtue of its agreements with growers which provided "crop to be property of Huntsville at all times"). See also *Parks* v. *Federal Crop Insurance Corp.*, 416 F. 2d 833 (C.A. 7) (farmers who grew corn from hybrid seed corn furnished by contractor that retained legal title to portion of crops were the actual producers of all the corn under a provision of the Federal Crop Insurance Act, 7 U.S.C. 1508(c)); *Elm Spring Farm* v. *United States*, 127 F. 2d 920 (C.A. 1) (milk handling corporation that held title to dairy cows tended by farmers not a milk producer within the meaning of orders issued under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246).

The Company instead asserts (Br. 9), again reflecting the analysis in *Tyson's, supra,* 355 F. 2d at 259–61 and *Strain, supra,* 405 F. 2d at 1031, 1033, that, under its contracts with the growers, ownership of the poultry carries with it the entire risk of loss in the farming operations, whereas in the cases in which the contracting company was held not to be a farmer, "the farm product had to be marketable, saleable, or acceptable to the company and thus the risk of loss fell on the farmer." In addition, the Company argues (Br. 9–10), citing *Strain,* that, in a contract relationship like the one it maintains with its growers, the contractor, and not the growers, "assumes the risk of market fluctuations which affect the price of the birds." Both of these arguments represent a considerable over-simplification of the economic realities.

The grower bears a substantial share of the risk of loss. He is able to enter into contracts with the

Company only after making a sizeable investment in land, poultry housing facilities, and related equipment."[14] Moreover, in carrying out his obligations under the contract, the grower incurs expenses not reimbursed by the Company under the contract. Thus, the grower pays the wages of any hired hands, the interest on any mortgage payments on the farm, any taxes other than local taxes on birds, and all maintenance and repair costs of his facilities and equipment (Pet. App. A–28).

While a grower is guaranteed a certain minimum payment based on square footage of his facilities supplied for housing the flock, he has no assurance that this fee will exceed his costs in any given contract period, much less that he will recover his original investment in land and farm facilities. Moreover, if for any reason the grower loses his farm, he is out of business, whereas the Company can simply switch to another contract grower or contract with the new owner of the farm for the raising of poultry. As

[14] The growers' combined investment probably exceeds that of the Company. A 1967 report issued by the U.S. Department of Agriculture stated that studies of broiler production in New England showed that for an annual output of 19.76 million birds, the investment of the growers would be approximately 6.4 million dollars, while the investment of the integrator (*i.e.*, the poultry contractor) in its hatchery, feed mill and processing operation would be about 2.3 million dollars. Because of "the large investment required," the report noted, "most integrators have not invested greatly in growout operations." U.S.D.A., Packers and Stockyards Administration, *The Broiler Industry: An Economic Study of Structure, Practices and Problems* (1967), p. 13 and Appendix 3. See also the description of grower investment in Arkansas, *id.* at 14, n. 13.

the First Circuit noted in *Elm Spring Farm* v. *United States, supra,* 127 F. 2d at 927:

> [The company] might have become a producer by acquiring a farm and milk cows and going into the business of operating a dairy farm with the attendant risks of loss. "It chose to employ the scheme in question here. It considered it advantageous to avoid the risks of production and now must bear the burdens of a determination that other entities than itself are the producers." *Gray* v. *Powell,* 1941, 314 U.S. 402, 414, 62 S. Ct. 326, 86 L. Ed —.

The growers in the present case have significant risks of loss related to market shifts and to factors influencing the number and size of the chickens at maturity. Since the contracts between growers and the Company remain in effect only for such successive flocks "as may be placed by mutual agreement" (Pet. App. A–23), the Company is free to negotiate new terms, including the amount of the fixed fee, before placing a new flock. Thus, the rates negotiated will normally reflect market shifts in poultry prices; while the effects on the growers of market shifts may be delayed, they are not eliminated. See B. W. Marion and H. B. Arthur, *Dynamic Factors in Vertical Commodity Systems: A Case Study of the Broiler System,* (Ohio Agricultural Research and Development Center, 1973), p. 44.

Although there is no specific contract condition requiring that the full-grown chickens be acceptable to the Company, that omission does not mean that the Company bears the full risk of loss from factors af-

fecting the survival and weight of the chickens. A grower's compensation includes, in addition to the square footage guarantee, a bonus payment based in part on the weight of the poultry raised to maturity; the compensation can be calculated only after a given flock has been weighed and taken to the processing plant. Thus, the grower is necessarily affected by anything which reduces the weight or number of chickens still alive at the end of the grow-out period.[15]

In short, although some risks have been shifted from the grower to the Company under the contract governing their relationship, the grower still is subject to the turns of fortune which have always affected those who invest their capital in farmland and their labor in farming. Accordingly, the grower, and not the Company, remains the farmer for purposes of the agricultural exemption.

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[15] The contract does guarantee the grower a prorated payment in the event of certain calamities (Pet. App. A–27):

"* * * the payment will be prorated on the basis of average mortality within a settlement, original flock density, and actual percentage salvaged when excessive bird losses resulted from:

"a) An act of God (including, but not limited to, fire, winds, snow, or flooding).

"b) OR, over 4% in excess of the average die as a result of lack of oxygen and/or heat exhaustion."

While the grower thus receives at least some payment in these circumstances, it is obviously less than he would receive had all the chickens lived to maturity. In other words, the loss in such circumstances is shared by grower and contractor. This provision does not cover mortality resulting from poultry diseases; the Company's general manager explained (A. 30–31) that, although the Company volunteered to absorb losses resulting from an epidemic of laryngotracheitis occuring shortly before the Board hearing, it was not obligated to do so under the contract.

b. The other factors in the relationship between the growers and the Company indicate the growers are independent farmers

Even if this Court were to conclude, contrary to the foregoing, that the risk of loss in the poultry-raising venture had been shifted to the Company, it would not necessarily follow that the Company was raising the poultry on the contract farms. Another important factor to be considered is the nature of the relationship between the growers and the Company—whether the growers are the agents or employees of the Company rather than independent contractors. *Mitchell* v. *Huntsville Wholesale Nurseries, Inc., supra,* 267 F. 2d at 291.

The Company (Br. 10) does not appear to be claiming that the growers and their hired hands are its employees;[16] it contends only that "[w]hether you define the relationship as an agency, subcontractor, or in substance as a lease by the company of the farm, equipment, and labor (A. 12), the elements of entrepreneurship have been shifted by contractual agreement from the farmer to the contractor company".

Although the Company provides some supervision of the growers,[17] the record shows that it is not the

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[16] Indeed, the agreements explicitly state that they are not (Pet. App. A–28).

[17] The contract provides that the grower will "follow instructions of the Bayside Supervisor in the care and management of Broiler, Roaster or Capon flocks" and will permit the Company's personnel to enter "any facility pertinent to this contract at reasonable times" (Pet. App. A–26 to A–27). The Company also determines the composition of the feed supplied to the farms and the scheduling of deliveries and provides certain disease-prevention and other services.

kind of supervision generally associated with an employer-employee relationship. Thus, the Company's general manager testified (A. 13) that the four field supervisors, or poultry servicemen, "called periodically on these farms on a routine basis *or* on a basis as the grower feels that he has a problem and needs their attention" (emphasis added). This suggests that some of the growers may encourage regular visits while others are content to call in the servicemen only in emergencies, such as conditions indicating the possible presence of disease. The existence of such supervision and auxiliary services has generally been held inadequate to show that the contractor is in fact engaged in farming.[18]

The legislative history of Section 203(a)(6) of the Fair Labor Standards Amendments of 1966, 80 Stat. 833, 29 U.S.C. 213(a)(6) establishes that Congress viewed growers for integrated poultry producers such as petitioners as independent contractors, and thus that the growers, not the integrated producers, are the

[18] *Waldo Rohnert Co.* v. *National Labor Relations Board*, *supra*, 322 F. 2d at 47 (contractor "given right to and does supervise the planting, inspects the growing crops * * * (removing undesirable plants) and decides when to irrigate * * *, when to weed, spray and finally when to harvest"); *Mitchell* v. *Huntsville Wholesale Nurseries, Inc.*, *supra*, 267 F. 2d at 289 n. 2 (the crops were "under [the contractor's] supervision as to the best methods of planting, production, digging, grading, packing, and shipping"); *Mitchell* v. *Hertzke*, 234 F. 2d 183, 190 (C.A. 10) (contractor determined "time and conditions of the planting [of bean crops], the conditions under which the beans were to be raised," and the time for harvesting). See also *Parks* v. *Federal Crop Insurance Corp.*, *supra*, 416 F. 2d at 835 (contractor agreed to furnish to corn growers "a man to supervise the planting of the seed").

farmers for purposes of that Section. It strongly suggests the same conclusion under the related Section 3(f), 29 U.S.C. 203(f), involved here.

Section 203(a) exempts "any employee employed in agriculture" from the minimum wage provisions of the FLSA under certain conditions. In explaining the effect of this exemption on farmers who contract with integrated poultry producers, Senator Yarborough, the floor manager of the bill, confirmed his questioner's belief in the continued applicability of "the traditional tests that have heretofore been applied under the Act in determining whether an independent contractor or an employee relationship exists" between the grower and the company, under which the grower—and not the company—was the agricultural employer affected by the exemption. Senator Yarborough specifically identified the tests involved as those contained in the committee report. (112 Cong. Rec. 20819–20820 (1966).)

That report, S. Rep. No. 1487, 89th Cong., 2d Sess. (1966), relies on *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, noting that "the total situation controls" in determining whether individuals are employees or independent contractors (S. Rep. No. 1487, *supra*, at 11).[19] The report (*ibid.*) lists the following factors,

[19] This is consistent with the Board's test for determining independent contractor status. See *National Labor Relations Board* v. *United Insurance Co.*, 390 U.S. 254, 258; *National Labor Relations Board* v. *Deaton, Inc.*, 502 F. 2d 1221, 1223–1224 (C.A. 5), certiorari denied, 422 U.S. 1047.

derived from *Rutherford* (331 U.S. at 730), to be considered:

> (1) The extent to which the services rendered are an integral part of the principal's business;
> (2) The permanency of the relationship;
> (3) The opportunities for profit or loss;
> (4) The initiative, judgment, or foresight exercised by the one who performs the services;
> (4) The amount of investments; and
> (6) The degree of control which the principal has in the situation.

The fact that the legislative history of Section 203(a) identifies these factors as the "traditional tests" for distinguishing between employees of farmers and independent contractors is strong evidence that they were also intended to apply in making the same distinction under Section 3(f) of the same statute.

The first factor is, in a broad sense, a statement of the ultimate issue; but in the context of *Rutherford,* where the individuals found to be employees were meat boners who "did a specialty job on the production line" in the employer's slaughtering plant (331 U.S. at 730) it could be viewed as a factor weighing against employee status for the growers and their helpers. Although the raising of the poultry is essential to the Company's business and the supplies and services furnished by the Company are necessary to the growers, the growers' work is scarcely an integral part of the Company's operation comparable to a single operation on an assembly line.

With respect to "the permanency of the relationship," the contracts are in effect only for a particular

grow-out period of seven to nine weeks and may be extended only "by mutual agreement." As shown (pp. 21–24, *supra*), the growers do have "opportunities for profit or loss"; and insofar as their total compensation depends on their bonus payments, which are in turn dependent on how many pounds of poultry they have produed by the end of the grow-out period, it is incumbent upon them to exercise "initiative, judgment, or foresight." Indeed, the Company's General Manager testified (A. 31) that the contract was designed so that "in a normal operating situation with normal mortalities, [a grower's] income would be influenced by his capabilities."

As already discussed, the growers have considerable amounts invested in the poultry raising, since they must furnish the farms, facilities, and labor.[20] Finally, although the contract enables the Company to exercise some supervision of operations, it is not the kind of close daily supervision over details of work which would be typical of an employer-employee relationship (see pp. 25–26 *supra*), and there is no evidence to suggest the Company has a voice in hiring or firing a grower's farmhands. Thus, the degree of control maintained by the principal is not such as to deprive the growers of independent contractor status.

In the light of all of the circumstances, the growers are independent contractors, as the legislative history referred to above indicates Congress understood to be

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[20] In contrast, in *Rutherford*, *supra*, 331 U.S. at 725, the meat boner's investment was limited to the cost of a hook on which to hang the meat, a knife, a knife sharpener, and a leather apron.

the case for typical contract growers in the broiler industry.

2. The Company's feed delivery operation is not a subordinate part of its farming operations

Although the Company is not engaged in the raising of poultry on the contract farms, it does, as the Board found, engage in some farming operations coming within the primary branch of Section 3(f) of the FLSA.[21] However, under the tests of *Maneja* v. *Waialua Agricultural Co., Ltd., supra,* 349 U.S. at 264–265, the feed delivery operation is not "part of [the Company's] agricultural venture" and the Board properly found that feed truck drivers do not perform duties incident to that venture.

[21] In discussing the Company's character as a vertically integrated poultry enterprise (Br. 10–19), the Company misconceives the Board's position and the reasoning of the court of appeals. Although the Board (Pet. App. A–18) found that "Bayside and Poultry Processing constitute a multifaceted organization whose enterprises and purposes go far beyond the bounds of traditional farming," it was not concerned, as the Company asserts (Br. 13), with the Company's "motivation," nor was it seeking, as the Company suggests (Br. 18–19), to place the entire organization "in the commerce column" or hold it to be entirely "non-agricultural." Rather the Board found, and the court agreed, that the Company consists of a number of different operations, some of which are agricultural and some of which are not—in other words, the organization *as a whole* was not placed in any "column" (Pet. App. A–4, A–18). The Board further found, and the court agreed, that the feed mill and feed delivery operations were not among the Company's farming operations and that they were not incident to any of the operations which were. In reaching that conclusion, it was appropriate, contrary to the Company's assertion (Br. 19), to look at each of the Company's components in order to determine the size of the nonfarming operations relative to that of the farming operations and to determine the relationship between the work of the employees in question and the farming operations. *Maneja* v. *Waialua Agricultural Co., supra,* 349 U.S. at 264–265.

In *Waialua,* this Court held that, in determining whether a particular operation is incident to or in conjunction with farming, it is necessary to consider all of the facts, including the seven criteria developed by the Wage-Hour Administrator (349 U.S. at 264–265):

> (a) The size of the ordinary farming operations. * * *
>
> (b) The type of product resulting from the operation in question. * * *
>
> (c) The investment in the processing operation as opposed to the ordinary farming activities. * * *
>
> (d) The time spent in processing and in ordinary farming. * * *
>
> (e) The extent to which ordinary farmworkers do processing. * * *
>
> (f) The degree of separation by the employer between the various operations. * * *
>
> (g) The degree of industrialization.

These criteria indicate that the operation of the feed mill is not incidental to the Company's farming operations, and that the feed delivery is incidental to the feed mill, and not the farming operations.

The ordinary farming operations of the Company are only a small part of its total enterprise. The Company owns and operates approximately six breeder farms and two hatcheries, a commercial hatchery and

a pedigree hatchery.[22] There are no more than 80 employees of these breeder farms and hatcheries, whereas the feed mill and processing plant employ more than 400 persons (A. 17, 60–62).[23] Since less than twenty per cent of the Company's workforce is engaged in actual farming operations, the Board (Pet. App. A–17) properly rejected the Company's claim that its operations, in the aggregate, constituted farming.

Nor do the other factors specified in *Waialua, supra,* indicate that the processing of the feed is incidental to the company's agricultural operations. The feed mill operation is separate from the ordinary farming operations; the mill itself is leased from the company that built it (A. 26–27), and is evidently operated by employees who have no ordinary agricultural duties (A. 18, 45).[24] Its function is to transform purchased ingredients—some of them, such as drugs and soybean meal, already in a manufactured state—into a manufactured agricultural product in a variety of forms (A. 14–15, 70). The mill produces about 120,000 tons of feed a year, and sells about a third of that to an unrelated company (A. 26). The production of feed is thus a typical industrial operation. *Maneja* v. *Waialua Agricultural Co., Ltd., supra,* 349 U.S. at 264–265; *Mitchell* v. *Budd,* 350 U.S. 473; 481–482; *Holtville Alfalfa Mills* v. *Wyatt,* 230 F. 2d 398, 403 (C.A. 9).

The feed delivery is the final step in the feed production process, and is thus incidental to the feed mill operation, not to the Company's farming operations. The feed mill drivers have very little contact with the Company's hatcheries and breeder farms. Most of the

[22] The six breeder farms are connected to the pedigree hatchery. The record indicates (A. 11) that there are eleven farms associated with the commercial hatchery, but the Company apparently does not own them. The Company did not specifically except to the Administrative Law Judge's finding that it owned and operated "two hatcheries and six primary breeding farms," and it asserted in its fact statement filed with the Board (A. 67) that "Bayside itself owns approximately seven farms ([Tr.] 130, 30) all of which at the present time are being used for the parent-grandparent operation ([Tr.] 133–34)." In its brief to the court of appeals (p. 2), the Company mentioned only the hatcheries, the 119 contract farms, and "six or seven company-owned farms (used for breeding)."

[23] The Company's Exhibit 5, a list of employees carried on the payroll of Bayside, the parent corporation (A. 60–62), has 80 names, but they include those of the Company's General Manager and the feed truck drivers and their dispatcher who, as shown below, have very little to do with the Company's own farms.

[24] Poultry farmers apparently ordinarily have not operated their own feed mills. A publication describing the Maine poultry industry during the 1960's notes that, before 1963, "three-fourths of the manufactured feed was shipped in from out-of-state plants." F. D. Reed, *The Maine Poultry Industry: Its Impact, Growth and Competitive Position* (Univ. of Maine, Cooperative Extension Service, Circular 394, Rev. July 1970), p. 9. Because of a change in rail rates in 1964 and because of "certain developments in milling technology," it became more advantageous to use feed mills within the state, so that, as of December 31, 1969, approximately "85 to 90 percent of the feed" consumed by Maine poultry was manufactured in the state (*id.*, Foreword and pp. 9–10). At this same time there were "13 commercial feed mills manufacturing poultry feeds" and only "a half-dozen small farm mills manufacturing feed for home use" (*id.* at 10), while there were then 737 broiler farms in the state (*id.* at 11; see also Tr. 75–76).

feed deliveries to the breeder farms are made by drivers working for the KLF feed mill rather than by the Company's drivers (A. 25). There is no exchange of duties between the feed truck drivers and the Company's farm employees. Instead, the drivers' duties in addition to loading their trucks and delivering feed to the contract farms are related solely to the feed mill operation; as shown (pp. 8–9, *supra*), the drivers sometimes transport feed ingredients to the mill from places as distant as Gloucester, Massachusetts.

The drivers report to the mill for work and return there when deliveries are completed to wash down their trucks. See *Vives* v. *Serralles*, 145 F. 2d 552, 555 (C.A. 1); *Calaf* v. *Gonzalez*, 127 F. 2d 934, 937 (C.A. 1). They are supervised by a dispatcher at the mill, and, although the dispatcher consults with the Company's broiler department manager—whose responsibilities include the supervision of the growers (A. 40–41)—regarding feed composition and scheduling, the dispatcher's "day-to-day" supervisor is, as he testified (A. 47), Merle Weymouth, the assistant manager of the feed mill, who is in charge of mixing the feed (A. 45, 47). Moreover, the undisputed testimony of a former Company feed truck driver shows that Weymouth hired and fired the drivers (A. 52–53, 58–59).[25]

In sum, the Company's farming operations constitute only a small proportion of its total enterprise,

[25] Although the drivers and the dispatcher were carried on the payroll of Bayside, the parent corporation (A. 60–62), Weymouth was identified as an employee of the subsidiary, Poultry Processing, which operated the mill (A. 32).

and the feed truck drivers do not perform work "incident to or in conjunction with" those operations, but instead work in conjunction with the independent feed production operation. The delivery of feed to the contract farms is not part of the Company's "agricultural venture."

C. THE DRIVERS DO NOT PERFORM WORK ON A FARM AS AN INCIDENT TO OR IN CONJUNCTION WITH FARMING OPERATIONS WITHIN THE MEANING OF THE FLSA AGRICULTURAL EXEMPTION

Neither petitioners nor the cases upon which they rely have suggested that the truck drivers' work might be within the secondary branch of the definition of agriculture in Section 3(f) on the theory that it involves "practices * * * on a farm as an incident to, or in conjunction with, such farming operations." Although the drivers' work requires them to spend some time daily on the growers' farms, that fact does not suffice to bring them within this part of the definition. This is so because first, the work the drivers perform on the farm is not of the type contemplated by this part of the definition, and second, in any event, the drivers are not "on the farm" for most of their working hours.[26]

[26] At least one court in addition to the court below has evidently concluded that the requirement that the agricultural work must be incidental to the *employer's* farming operations (*supra*, p. 16) applies to work claimed to be exempt because performed "on a farm" as well as to that performed "by a farmer." See *National Labor Relations Board* v. *Olaa Sugar Company*, 242 F. 2d 714, 718 (C.A. #9); Pet. App. A–3.

1. The delivery of supplies is not work "on a farm" within the agricultural exemption

As this Court observed in *Farmers Reservoir & Irrigation Co.* v. *McComb, supra,* 337 U.S. at 767, the secondary branch of the definition of agriculture in Section 3(f) as originally proposed would have included only "practices * * * performed by a farmer as an incident to, or in conjunction with, such farming operations * * *." On an amendment offered by Senator McGill, the phrase "or on a farm" was inserted immediately following "by a farmer." 81 Cong. Rec. 7888 (1937). The concern prompting the amendment, as this Court noted (337 U.S. at 767), was that the definition of agriculture would otherwise not cover "the threshing of wheat or other functions necessary to the farmer if those functions were not performed by the farmer and his hands, but by separate companies *organized for and devoted solely to that particular job*" (emphasis supplied).[27]

[27] The following colloquy, quoted by the Court, 337 U.S. at 767 n. 16, took place between Senators Tydings and Borah (Senator Borah was a member of the Senate Committee on Education and Labor which reported out S. 2475, eventually enacted into law as the FLSA):

"Mr. Tydings. * * * In the case I visualize * * * the farmer is not performing the service. The man to whom I refer makes a business of doing nothing but threshing. He owns his own machine, and hauls it from farm to farm, and enters into contracts with farmers to thresh their crops; the point being that while he is dealing with an agricultural commodity, he is not necessarily a farmer, and he is not doing work ordinarily done by a farmer.

"Mr. Borah. He is doing the exact work which the farmer did before he took it up.

"Mr. Tydings. That is true, but I do not think the bill is drawn in sufficient detail to bring the man to whom I refer under its provisions of exemption." (81 Cong. Rec. 7653 (1937).)

See also the comments of Senator Bone, *id.* at 7659, and the colloquy between Senators McGill, George and Black, *id.* at 7888.

Thus, the practices performed "on a farm" to which the exemption was intended to refer are activities, such as threshing, performed substantially, if not entirely, on a farm by employees of a company providing specialized agricultural services, and carried out as part of a traditional farming activity, such as harvesting. Accordingly, the Wage and Hour Division of the Department of Labor has issued the following interpretation of "employment in practices on farm" (29 C.F.R. 780.136):

> § 780.136 Employment in practices on a farm.
>
> Employees engaged in building terraces or threshing wheat and other grain, employees engaged in the erection of silos and granaries, employees engaged in digging wells or building dams for farm ponds, employees engaged in inspecting and culling flocks of poultry, and pilots and flagmen engaged in the aerial dusting and spraying of crops are examples of the types of employees of independent contractors who may be considered employed in practices performed "on a farm". Whether such employees are engaged in "agriculture" depends, of course, on whether the practices are performed as an incident to or in conjunction with the farming operations on the particular farm, as discussed in §§ 780.141–780.147; that is, whether they are carried on as a part of the agricultural function or as a separately orga-

nized productive activity (§§ 780.104–780.144). Even though an employee may work on several farms during a workweek, he is regarded as employed "on a farm" for the entire workweek if his work on each farm pertains solely to farming operations on that farm. The fact that a minor and incidental part of the work of such an employee occurs off the farm will not affect this conclusion. Thus, an employee may spend a small amount of time within the workweek in transporting necessary equipment for work to be done on farms. Field employees of a canner or processor of farm products who work on farms during the planting and growing season where they supervise the planting operations and consult with the grower on problems of cultivation are employed in practices performed "on a farm" so long as such work is done entirely on farms save for an incidental amount of reporting to their employer's plant. Other employees of the above employers employed away from the farm would not come within Section 3(f). For example, airport employees such as mechanics, loaders, and officer workers employed by a crop dusting firm would not be agriculture employees [citations omitted].

The decisions on the status of activities allegedly exempt by reason of being "practices performed on a farm" as an incident to farming operations have been consistent with this interpretation. See, *e.g., Boyls* v. *Wirtz,* 352 F. 2d 63 (C.A. 5) (pilot and flagman engaged in aerial crop dusting within the exemption, but not their off-farm support personnel); *Holtville*

Alfalfa Mills v. *Wyatt, supra,* 230 F. 2d at 402–403 (remanded on theory that transportation of chopped alfalfa from field to mill by drivers who did not handle product at mill but returned immediately to field with empty trucks would be exempt as on-the-farm activity only if factual findings showed that transportation was actually a continuous part of harvesting); *Tipton* v. *Associated Milk Producers, Inc.,* 398 F. Supp. 743 (N.D. Tex.) (employees who installed and repaired milk cooling equipment on farms are within the exemption where off-farm work was only occasional, minor, and incidental). But see *Wirtz* v. *Osceola Farms Co.,* 372 F. 2d 584, 589 (C.A. 5) (exemption applied to drivers employed by sugar mill to transport farm laborers to farm of independent growers and to bring meals to the laborers during harvesting).

By contrast to the types of activities exempt under the principles set forth above, the delivery of supplies such as poultry feed to a farmer is essentially the final phase of the operation by which supplies are produced and distributed, rather than an incident of the poultry-feeding process.[28] This distinction is

[28] The situation might be different if, for example, the drivers had significant responsibilities for the care of the chickens or even for assuring the proper operation of the feeding equipment. Instead, although they take certain precautions on the farms to avoid spreading disease or spoiling the feed, they have no direct contact with the poultry and are no more involved in actual farm activities than truck drivers who took care to avoid causing fires when delivering crude oil to oil refineries would be involved in oil refining.

reflected in the language of Section 3(f). In defining the practices included in the secondary branch of agriculture, Congress specifically identified "delivery to storage or to market or to carriers for transportation to market." Such deliveries of farm products are the final phase of the agricultural venture. On the other hand, the delivery of supplies to the farm is the final phase of their production. And the off-farm production of such supplies is a separately organized nonagricultural function, even when the supplies are essential to farming.[29] Their distribution to farms is hardly akin to wheat threshing, even if a portion of the activity takes place on the farm.

Thus, in *Johnston* v. *Cotton Producers Assn.*, 244 F. 2d 553 (C.A. 5), in which the employee in question worked for an organization which, like the Company, placed its chicks on contract growers' farms to be raised into broilers, the court held (*id.* at 555) that the empolyee's work in supervising the growing of the chicks and catching and cooping them for market was, to the extent done on the farms, within the agricultural exemption of the FLSA. However, the same employee's work in "hauling a load of fertilizer from the car in which it was shipped from outside the state to a farmer customer" was "in connection with and incidental to a retail sale" (*ibid.*) and

[29] See, *e.g.*, *Wirtz* v. *Ti Ti Peat Humus Co.*, 373 F. 2d 209, 213 (C.A. 4), certiorari denied, 389 U.S. 834 (production of peat moss used as a soil conditioner and fertilizer); *McComb* v. *Super-A Fertilizer Works, Inc.*, 165 F. 2d 824, 828 (C.A. 1) (production of fertilizer), cited with approval in *Farmers Reservoir & Irrigation Co.* v. *McComb*, *supra*, 337 U.S. at 761.

thus within the retail establishment exemption, not the agricultural exemption, of the FLSA. In the present case, there is no formal retail sale of poultry feed because the feed cost is simply figured into the formula by which the grower's total compensation is calculated; nevertheless, the Board's finding (Pet. App. A–19) that the delivery of the feed was incident to the feed milling operation is analogous to the finding in *Johnston* that the delivery was incident to the sale.

Nor is *Farmers Reservoir & Irrigation Co.* v. *McComb, supra,* authority for the view that a simple supply function, like the feed mill drivers', is within the agricultural exemption. There this Court indicated (337 U.S. at 766) that the work of employees of a company that collects, stores and distributes irrigation water would be exempt as "a practice performed as an incident to or in conjunction with farming" if performed by a farmer or on a farm. This is because irrigation of the farm itself, as opposed to simply delivering water to floodgates at the edges of the farm, would result in the actual watering of crops.[30] The exemption of the irrigation workers would not follow because, like the truck drivers here, they simply delivered supplies to the farm. The fact that the truck drivers, unlike the irrigation workers, must enter the

[30] The Court emphasized this distinction in concluding that the irrigation workers were not farmers: "the responsibility of the company's employees ceases when they so release the water. The water is supplied to the farmer at the head gates and he takes it over there and uses it, in his own laterals as he sees fit, to irrigate his crops" (*id.* at 763).

farm in order to make their deliveries, does not suffice to bring the basic delivery function within the exemption.

2. The driver's work is not substantially performed "on a farm"

Even if the truck drivers' deliveries to the growers are considered to be incidental to the growers' farming operations, the drivers are not working "on the farm" in any substantial sense. Their on-farm work is instead simply incidental to their main job, both in terms of importance and of the time consumed. They are drivers, not feed bin loaders—their primary function is to transport the feed to the growers, and that function cannot be performed on a farm. See 29 C.F.R. 780.134.[31] Moreover, they are physically on a farm for only one-half to one hour at a time, or a total of one and a half to four hours out of the usual nine-hour work day (A. 21, 54, 57–58). Thus, most of their work time is not spent on a farm, and is not within the agricultural exemption.

Originally, the Board declined to assert jurisdiction over employees who regularly spend part of their time in agricultural work. See *Clinton Foods, Inc.*, 108 NLRB 85; *National Labor Relations Board* v. *Olaa Sugar Company, supra,* 242 F. 2d at 719–721.

[31] In contrast, in *Wirtz* v. *Lyon Flying Service*, 16 WH Cases 414 (W.D. La.), the agricultural exemption applied to employees of a crop dusting company who drove with fertilizers and insecticides from the company office to farms where they spent the day loading the crop dusting planes, returning to the office at the end of the day to wash their trucks. In that case, the employees were loaders, not drivers; their on-farm work was more significant than their transportation responsibilities.

The Board has, however, formally abandoned the *Clinton Foods* doctrine, and now follows the rule that the National Labor Relations Act covers employees who regularly perform non-agricultural work, in addition to some agricultural work. *H. A. Rider & Sons,* 117 NLRB 517; *Olaa Sugar Company,* 118 NLRB 1442, 1443 (on remand from *National Labor Relations Board* v. *Olaa Sugar, supra*).[32] This rule was disapproved in *National Labor Relations Board* v. *Kelly Brothers Nurseries, Inc.,* 341 F. 2d 433 (C.A. 2) when applied to bring within the coverage of the Act employees spending more than eighty-five percent of their time in agricultural work. But the court emphasized the soundness of a rule which would cover employees whose work was substantially non-agricultural.

In *Kelly Brothers,* the objection was simply that the "small proportions (of non-agricultural work) are inadequate to tip the scales in favor of bringing these men, who would be regarded as farmers on any realistic view, within the National Labor Relations

[32] It is settled that the exemptions to the Fair Labor Standards Act, including the agricultural exemption, are not applicable if the workweek includes any nonexempt work at all. Thus, *Mitchell* v. *Hunt*, 263 F. 2d 913 (C.A. 5) held that the FSLA applied to all work of empoyees who worked in admittedly exempt farming operations every day of the week, but worked at the farmer's auction barn on Saturday, where he sold livestock of other farmers as well as his own. Accord, *Hodgson* v. *Wittenburg*, 464 F. 2d 1219, 1220–21 (C.A. 5); *Hearnsberger* v. *Gillespie*, 435 F. 2d 926, 930 (C.A. 8); *Wirtz* v. *Von Carstedt*, 362 F. 2d 67, 69–70 (C.A. 9); *Tobin* v. *Blue Channel Corp.*, 198 F. 2d 245, 248 (C.A. 4); *Wabash Radio Corp.* v. *Walling*, 162 F. 2d 391, 394 (C.A. 6); 29 C.F.R. 780.11.

Act" (*id.* at 439).[33] Here the converse situation exists: the small proportions of their agricultural work are inadequate to bring the feed truck drivers, who would not be regarded as farmers on any realistic view, within the agricultural exemption to the Act.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[33] Recent Board decisions involving the mixed work rule are essentially consistent with this reasoning. See, *e.g.*, *Aquaculture Research Corp.*, 215 NLRB No. 1, 87 LRRM 1496 (jurisdiction asserted where agricultural and nonagricultural work intermixed and nonagricultural work was substantial); *Light's Tree Co.*, 194 NLRB 229 (jurisdiction not asserted where ninety per cent of total worktime was spent in agricultural work).

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IN THE

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OCTOBER TERM, 1976

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Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD.

On Writ of Certiorari to the United States Court of Appeals
for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF GEORGIA POULTRY FEDERATION, INC.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF GEORGIA POULTRY FEDERATION, INC.

Georgia Poultry Federation, Inc. hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the Petitioner has been obtained. Counsel has been advised that the Solicitor General, as attorney for the Respondent, will not oppose the filing of the brief if filed sufficiently prior to oral argument.

The interest of the Georgia Poultry Federation in this case arises from the fact that it is an association whose membership includes all integrated poultry producers in the State of Georgia, each of whom will be substantially affected by the ruling in this case. Like the Petitioners herein, these members of the Georgia Poultry Federation are companies engaged in the production of poultry who use contract growers during the growout phase of production, but who generally own the poultry throughout all stages of production, supply the initiative for and major investment in the production, and make all the important decisions with respect to both production and marketing of the agricultural product. These integrated producers thus perform the critical functions and face the traditional risks which are inherent in the role of the farmer producing an agricultural product.

The qualification of integrated poultry producers as agricultural producers entitled to the special consideration afforded by Congress to such producers under a supportive national agriculture policy implemented by a comprehensive statutory scheme, including the labor exemption at issue here, is a matter of paramount importance to all poultry producers. It is likely that the decision in this case will control the application of agricultural exemptions to integrated poultry producers in a variety of contexts, including federal and state taxation and antitrust laws in addition to the Fair Labor Standards Act and the National Labor Relations Act.

The character of integrated poultry production operations as "agriculture" and "farming" has been recognized and affirmed repeatedly by the Fifth, Eighth, and Ninth Circuits. This case offers the Court an opportunity to make the practical reasoning of those circuits binding and conclusive in all areas where poultry is produced in the United States.

The Petitioners have relied upon a distinction between a "primary" and "secondary" meaning of agriculture drawn by the

Court below from this Court's decision in *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949), and have limited their argument before this Court to a contention that Bayside and its employees fall only within the "secondary branch of farming". (Pet. Br. at 6). It is believed that Bayside and other integrated poultry producers fall within the "primary" meaning of agriculture as this Court intended the definition to be read, and the attached brief which *amicus curiae* is requesting permission to file develops this argument for the Court's consideration. The "primary" definition argument offered by *amicus curiae*, which is not otherwise developed in briefs before the Court, would be dispositive of this case if accepted.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF GEORGIA POULTRY FEDERATION, INC.

INTEREST OF THE AMICUS CURIAE

The Georgia Poultry Federation includes in its membership all integrated producers of broilers, eggs and turkeys in Georgia. Georgia is the poultry capital of the world, leading all states in total income from poultry and poultry products.

The integrated poultry producers who are members of the Georgia Poultry Federation have a vital interest in the decision of this case for two reasons: (a) it will directly affect the right of all of them to claim the specific exemption at issue here, and (b) the decision in this case is likely to control indirectly the application of agricultural exemptions to integrated poultry producers in a variety of contexts, including federal and state taxation and antitrust, in addition to imposing upon them the broad requirements of the Fair Labor Standards Act and the National Labor Relations Act.

ARGUMENT

A. Poultry "Farming" Today Is Carried on Almost Exclusively by Integrated Producers Who Own the Birds, Initiate and Direct Production, and Bear the Risks of Production and Marketing.

The question of overriding general importance presented by this case is whether or not integrated poultry production as it is carried on today is "farming" or "agriculture". The techniques and organization of the poultry system are unique in agricultural production, and their uniqueness poses certain analytical problems in statutory application. Nevertheless, there can be no doubt that the result is an agricultural product, and the integrated poultry producer faces the same agricultural risks and problems which gave rise to the congressional concern for farmers underlying the creation of a comprehensive statutory scheme of protection for agricultural producers.

"Agriculture", in the terms of Fair Labor Standards Act Section 3(f), 29 U.S.C. 203(f), includes "farming in all its branches," including "the raising of . . . poultry." If what integrated poultry producers do is "farming", then they are exempt from a variety of requirements imposed generally upon employers under the Fair Labor Standards Act and the National Labor Relations Act.

Poultry "farming" today involves several stages and operations. For broiler chickens such as Bayside produces, it includes (a) the placement, raising and breeding of breeder flocks to produce eggs for hatching as broiler chicks, (b) the hatching of these eggs and the placement of the chicks for growout to maturity, (c) the growing of the broiler chicks to the age of maturity, (d) the catching, cooping and hauling of the grown-out birds to processing facilities, and (e) the operation of facilities to process and prepare the broilers for market.

In the present day broiler system, all or most of these operations are carried on by integrated producers through various kinds of employees and, during the growout stage, contract growers. The integrated producer provides the initiative for production in the first instance, directs the production operations in all phases, supplies inputs accounting for more than 90% of the production costs, makes all important production and marketing decisions, and bears the risk of being unable to market the agricultural product at a price adequate to cover the production and marketing costs.

During the growout phase, where contract growers are employed to house and care for the birds until they reach maturity, ownership of the birds remains in the integrators. In addition to owning the birds, the integrated producers choose the breed or type of broiler to be produced and make all decisions with respect to the number and timing of chick placements; supply the feed and make all decisions with regard to diet and type of feed; supply the medicines, vaccines and other health supplies for the birds; supply all veterinary services during the growout period; transport the chickens and feed to the growers, and transport the grown-out chickens from the growers to the processing plants; provide the equipment and some or all of the labor for catching, cooping and loading the live birds; and make all decisions with regard to the age and size at which the birds shall be marketed. Fieldmen or supervisors employed by the integrators provide supervision of the growout operation to assure that the grower is properly feeding, watering and otherwise caring for the producer's birds.

Having initiated, paid for and directed the production of broilers, the integrated producer must then market his product in a typical agricultural market. There is no live market for broilers today, and broilers are marketed in fresh, ready-to-cook form by the integrated producers. The product is highly perishable, and once production is committed, the integrator must either sell his

product or destroy it. Pricing is characterized by volatility and instability, a characteristic which is harmful to producers and consumers alike, and the product is distributed through middlemen intervening between the integrator and the consumer. Integrated broiler producers are scattered and largely uninformed with respect to inventories and demand, and the market is consequently highly susceptible to over-production. The demand for broilers is seasonal and cyclical, the market price fluctuates weekly and sometimes hourly, and the market is dominated by concentrated buyers. It is apparent from all of this that integrated broiler producers occupy the traditional role of "farmers" in producing and marketing an agricultural product.

B. Integrated Broiler Producers Such as Bayside Are Engaged in "Agriculture" in Its Primary Meaning—"The Raising of . . . Poultry."

The decision of the First Circuit Court of Appeals below was based on a misreading of this Court's decision in *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949). In *Farmers Irrigation Co.*, this Court indeed observed that the section 3(f) definition of "agriculture" has two branches. "Farming in all its branches" was said to be the "primary meaning", and "practices performed either by a farmer or on a farm" fell within the "broader meaning" of agriculture. *Id.* at 762, 763. The Farmers Irrigation Company was organized solely to supply irrigation water to farmers, and it produced no product of its own at all, unless irrigation water is considered a product. Thus this Court observed that the Company for whose employees the exemption was claimed "owns no farms and raises no crops". *Id.* at 763. As the Court further noted: "The ditch company, then, is not engaged in cultivating or tilling the soil or in growing any agricultural commodity". *Id.* at 764. It is obvious therefore that the employer in Farmers Irrigation Co. was not "farming" in any branch, and the Court relied on the character

of the employer's activity to determine that its employees were not employed in agriculture under the "primary meaning" of the word.

Just the opposite is true with the Petitioner here and with all integrated poultry producers. Bayside is engaged in "growing an agricultural commodity"—fresh dressed broilers—as its principal and overriding function. All of its activities, from breeder farm to processing and marketing, are a part of its main business activity of producing and marketing broilers. The entire investment and effort of the integrated broiler producer are devoted principally to "agriculture" in one of its important branches—"the raising of . . . poultry". To hold otherwise is to ignore the purpose of the integrated operation entirely.

This practical reasoning underlies the view held by the Fifth,[1] Eighth[2] and Ninth[3] Circuits, which is directly contrary to the holding of the First Circuit in this case. In the *Tyson's Poultry* case, the Eighth Circuit held that employees who worked in an egg assembly plant operated by an integrated egg producing firm were "employed in agriculture" and thus exempt from the Fair Labor Standards Act. The appellees in Tyson's Poultry, Inc. (whose assembly plant employees were the workers involved), Poultry Growers, Inc., an affiliated corporation which produced eggs through contract growers similar to Bayside's broiler growers, a parent corporation which owned all the stock of the first

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[1] *McElrath Poultry Co., Inc. v. National Labor Relations Board*, 494 F.2d 518 (5th Cir. 1974); *Abbott Farms, Inc. v. National Labor Relations Board*, 487 F.2d 904 (5th Cir. 1973); *National Labor Relations Board v. Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969); *United States v. Chemell*, 243 F.2d 944 (5th Cir. 1957); *Nix v. Farmers' Mutual Exchange of Calhoun, Inc.*, 218 F.2d 642 (5th Cir. 1955).

[2] *Wirtz v. Tyson's Poultry, Inc.*, 355 F.2d 255 (8th Cir. 1966).

[3] *National Labor Relations Board v. Victor Ryckebosch, Inc.*, 471 F.2d 20 (9th Cir. 1972).

two, and an individual who was president of all three corporations. The Eighth Circuit held as follows:

> "We are here concerned with a single and completely integrated farming operation carried on and headed up by appellees through their affiliated corporation, Poultry Growers, Inc. As found by the District Court, the appellees are farmers and are the ones who initiated the farming operations here involved. Without appellees the independent growers arguably would never have undertaken the initial and continuing cost of acquiring the birds and producing the eggs. The contract growers merely aid the appellees, who the District Court found to be the ones qualified to claim the agricultural exemption under the Act as to their employees engaged in the 'handling, cooling, grading, candling and packing' of eggs." 355 F.2d at 258.

The Fifth Circuit's decision in *Strain Poultry Farms, Inc.* is directly in point, and directly contrary to the decision of the Court of Appeals in this case. Strain was an integrated broiler producer, and the National Labor Relations Board found Strain guilty of unfair labor practices under the National Labor Relations Act. The NLRB petitioned for an enforcement order, and the Fifth Circuit denied enforcement on the ground that the employees involved—truck drivers employed by Strain to haul live chickens to processing plants—were "agricultural employees" within the meaning of 29 U.S.C. 152(3) (NLRA Section 2(3)) and 29 U.S.C. 203(f) (FLSA Section 3(f)). In *Strain*, as in this case, the integrated producer employed independent contract growers during the growout phase of broiler production.

The Board in *Strain* argued that the broilers were "the results of someone else's farming efforts—the independent growers," contending that the fact that Strain used independent growers destroyed its claim to having raised the birds. 405 F.2d at

1030. After carefully analyzing the applicable law and the form and function of Strain's integrated operation, the Court concluded as follows:

> "In summary, the Board's finding that the employees were not agricultural employees can only be sustained if respondent's arrangement with the independent growers is viewed as removing it from the primary definition of agriculture pertinent here, 'the raising of poultry'. Since we have concluded that this is not the case, there was no warrant in the record or a reasonable basis in law for the Board's conclusion that the employees were not 'agricultural laborers within the meaning of Section 2(3) of the NLRA.'" *Id.* at 1033.

As was the case with the delivery truck drivers in *Strain*, the activities of the feedtruck drivers in this case are not only incidental but are absolutely essential to the integrated poultry-raising operation here. These drivers deliver the feed rations—specified and mixed by Bayside—to Bayside 's broiler chickens housed in the contract growers' facilities. They are delivering Bayside's feed to Bayside's birds during the growout process. Delivering the feed to the birds is clearly an essential part of the integrated poultry-raising operation. This was the conclusion of the Fifth Circuit in *Strain*:

> "Furthermore, the trucking activities were part of Strain's poultry-raising venture. They were performed incident to or in conjunction with Strain's poultry-raising operations and Strain was not a poultry raiser conducting a trucking operation on the side. The trucking operation was a part of an integrated poultry-raising operation and, although unlike poultry farms of the past, it is today a typical broiler raising operation." Id. at 1032.

The reasoning of *Strain* was adopted, on "substantially identical" facts, by the Ninth Circuit in *NLRB v. Victor Ryckebosch, Inc.*, 471 F.2d 20 (9th Cir. 1972). In *Ryckebosch*, the integrator also owned and operated a processing plant. See *Victor Ryckebosch, Inc.*, 189 NLRB 40, 41-42. The *Strain* reasoning has been reaffirmed twice more by the Fifth Circuit in recent years. *Abbott Farms, Inc.*, and *McElrath Poultry Co.*, *supra*, p. 5, n.1.

The same recognition of the realities of modern broiler production and its "farming" character underlies a number of decisions allowing integrated poultry producers to take advantage of various provisions of the Internal Revenue Code available only to "farmers". See *United States v. Chemell*, 243 F.2d 944 (5th Cir. 1957); *Maple Leaf Farms, Inc.*, 64 T.C. 438 (1975); *Garth*, 56 T.C. 610 (1971).

Respondent has made a point of arguing that contract growers bear some risks of loss in connection with the poultry raising operations at issue here. The Brief cites studies which indicate that growers make a sizable investment in land, poultry housing facilities, and related equipment. (Respondent's Br. 22, n.14). What the Respondent fails to mention is that the integrated broiler producers supply the birds themselves and inputs which together account for more than 90% of the cost per pound of producing broilers on an operating basis, including feed which accounts for more than half the total cost of producing broilers. Moreover, the growers are guaranteed a return for their labor and facilities, while the integrated producer must find a buyer for the agricultural product in the open market if he . to recover for his efforts and investment.

It is true that growers bear some risks during the growout phase ot broiler production. Nevertheless, there is nothing in the law to suggest that a farmer must bear 100% of the risk of producing and marketing his product in order to engage in "agriculture" or "farming". With the variety of crop mortgage financing available to farmers today, shared risk is more the

rule than the exception in modern farming. Moreover, the Fifth Circuit in *Strain* was not at all bothered by the fact that the poultry raising was "shared" with independent growers:

> "As in all the other cases cited by the Board on this point, the distinction between those situations and the present one is that these birds belonged to the respondent and, although the raising of them was shared with independent growers, Strain's activities were more nearly that of one engaged in the 'raising of . . . poultry' than that of a purchaser, jobber, etc." 405 F.2d at 1033.

There is no reason to conclude that contract growers, just because they may share some of the functions and some of the risks of poultry raising, are the only persons engaged in "agriculture".

CONCLUSION

Integrated poultry operations are organized and operated for one purpose: the production and marketing of broilers. As the *Strain* court observed of the integrated broiler producing operations before it, "although unlike poultry farms of the past, it is today a typical broiler raising operation". Integrated broiler production is within the "primary" definition of agriculture, and Bayside's feed truck drivers, who deliver the rations mixed and supplied by Bayside to the location where Bayside's broiler chickens are housed, are clearly essential to Bayside's integrated poultry raising operation. For this reason, the drivers are "agricultural laborers" within the meaning of the exemption, and the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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